A

DIGEST OF HINDU LAW.

FROM THE REPLIES OF THE SHASTRIS IN THE SEVERAL COURTS OF THE BOMBAY PRESIDENCY.

WITH AN INTRODUCTION, NOTES, AND APPENDIX.

EDITED BY

RAYMOND WEST, B.A.,

OF H. M. BOMBAY CIVIL SERVICE,

AND

JOHANN GEORG BÜHLER, PH.D.,

ACTING EDUCATIONAL INSPECTOR, NORTHERN DIVISION.

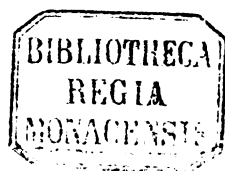
BOOK II.

PARTITION.

Bombay:

PRINTED FOR GOVERNMENT

AT THE EDUCATION SOCIETY'S PRESS, BYCULLA.

1869.

PREFACE.

THE present Volume is a second instalment of the Digest of Hindu Law, as set forth in the opinions of the Shastris, commenced with the volume on Inheritance, brought out by the Editors two years ago. The replies on the subject of Partition, though much less numerous than those on Inheritance, have still been found sufficiently numerous and consistent, the Editors think, to afford adequate illustration of this branch of the Hindu Law.

In arranging the questions and answers it has been found convenient to adhere to that distribution of the subject which is generally adopted by the Hindu Lawyers, and which, no doubt, the Shastris had present to their minds in giving their replies. In preparing the Introduction the Editors have ventured to proceed upon a different method,—one which they think classifies the different portions of this branch of the law more distinctly, and is thus calculated to make a more definite and abiding impression, than the plan usually followed.

It has been objected to the first part of the Digest that, as a work for the legal practitioner, it is deficient in notices of actual decisions by the Courts. It did not fall within the duty originally assigned to the Editors to incorporate such decisions in the work; and those which for their own information they had collected and considered, were, as explained in the preface to the first part, in general omitted. In a second edition, whenever one

may be authorized by Government, they hope to supply this defect; and in the preparation of the present volume they have endeavoured to set forth the results of all the principal cases on the subject of Partition to be found in the Reports of the several High Courts and of the Privy Council. For the views taken of any of these cases no special authority can of course be claimed; but it is hoped that the connexion in which they are presented will be an aid towards the establishment of a clear and sound theory on the points that may be considered as still open to controversy.

On one point treated of by the Editors in the volume on Inheritance, the views expressed by them have sometimes been called in question. This is the subject of Strídhan; as to which the theory of the Mitâkshará differs so considerably from those propounded in some other works of authority that some difference of opinion on its precise nature might be expected to prevail. In arriving at the conclusions set forth by them, the Editors were guided to some extent by the authority of the Víramitrodaya, itself a work of acknowledged authority on this side of India; and they have thought it expedient to add to the present volume, by way of appendix, a translation of the section of the Víramitrodaya which bears on this subject. The result, they believe, will be to satisfy the reader that they have not assigned to the term "Strídhan" a greater comprehension than Vijñanes'vara intended it to have, whether his theory is in itself one that can be maintained or not. In a final note some of the recent cases on the subject are discussed; and it will be seen that the reception of Vijñánes'vara's theory, peculiar as it appears to be to him and his followers, does not really present any extraordinary difficul-

ties as compared with the views of other commentators, and need not in general be attended with practical results differing very much from those arrived at from the principles laid down by the other authorities acknowleged in Western India.

The work is furnished with an Index, which will materially contribute, the Editors trust, to its usefulness.

The Editors desire to acknowledge the assistance they have received in the preparation of this volume from Mr. Vithalráo Patwardhan, First Assistant Teacher of Sanscrit in the Elphinstone College.

TABLE OF CONTENTS.

THE LAW OF PARTITION.

---

§ 1. THE Law of Partition is the aggregate of the rules, which, when a Hindu family, living in union, separates, determine the duties and rights of its several members with respect to the common property and liabilities. DEFINITION.

REMARKS.

(1.) The Hindu lawyers of the Western school treat of Partition under the title Dáyavibhága, regarding the contents of which see Digest, vol. I. page xxxviii.

(2.) Regarding the Hindu definition of the word "Partition," see Colebrooke, Mit. Chapter I. Section 1, para. 4. Vijñánes'vara's definition is defective, since it does not touch on the duties and liabilities of the coparceners, which, as the subsequent treatment of this Title shows, are apportioned in the act of Partition just as clearly as the shares of the common property.

§ 2. The subjects which the law of Partition presents for consideration, therefore, are— *Subdivision.*

I. The family living in union.

II. The separation of such a family.

III. The common property to be distributed.

IV. The common liabilities to be distributed.

V. The duties and rights arising from the separation.

REMARK.

The evidence of Partition, though it forms strictly no part of the law of Partition, may be included under this head for convenience' sake, and in deference to the custom of the Hindu lawyers, who always treat it under this title.

The family living in union.

§ 3. A family living in union may be either undivided (avibhakta) or reunited (samsrishta).

I. An undivided family consists—

(*a.*) Of an ancestor and his descendants.

(*b.*) The descendants of a common ancestor.

The descendants must be legitimate descendants of the body, or else legally adopted sons, except in the case of S'údras, where illegitimate sons have rights analogous to those of legitimate sons.

The right of descendants extends only to the third degree from an ancestor, living undivided and being the head of a family or of a particular branch.

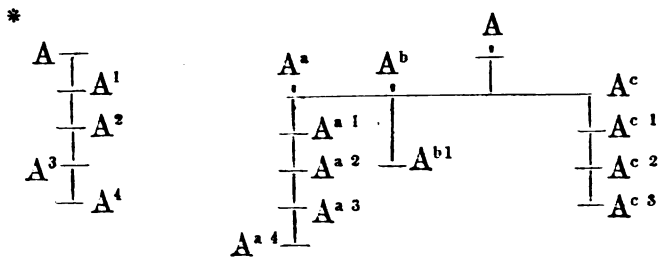
Thus—

(1.) If A, A^1, A^2, A^3 and A^4 live together, and A^1, A^2 and A^3 predecease A, then A^4 will have no claim to a share of A's property.

(2.) If A^a, with his four descendants, A^b and A^c with their one and three descendants respectively, live together, and A^a's first, second and third descendants predecease A^a, and if A^a die afterwards, then $A^{a\,4}$ will have no claim to a share of the family property.*

---

*

The family living in union

The principle operating here is the same as that applying to the law of Inheritance in an undivided family; see I. Dig. p. xli.

Males only, can be the subjects of the full rights of coparceners. But women, *i. e.* wives, mothers, grandmothers and daughters possess latent or inchoate rights of participation, which become effective when separation takes place.

REMARKS.

(I.) The principle limiting the participation of descendants from a common ancestor who live in union, is most explicitly stated in the Víramitrodaya, fol. 177, p. 1, l. 6 sqq. :—

कात्यायनः ।

अविभक्ते निजे प्रेते तत्सुतं रिक्थभागिनम् ।
कुर्वीत जीवनं येन लब्धं नैव पितामहात् ॥
लभेतांशं पित्र्यं तु पितृव्यात्तस्य वा सुतात् ।
स एवांशस्तु सर्वेषां भ्रातॄणां न्यायतो भवेत् ॥
लभेत तत्सुतो वापि निवृत्तिः परतो भवेत् ।

निजे भ्रातरि । तत्सुतं भ्रातृपुत्रम् । जीवनं भागः । स कीदृशं भागं लभत इत्यपेक्षित आह पित्र्यमंशमिति । तत्सुतो यस्य धनं विभज्यते तस्य प्रपौत्रः पौत्रस्य प्रस्तुतत्वात् । परतस्तत्सुतान्निवृत्तिर्भागनिवृत्तिर्भवेत् । प्रपौत्रपुत्रो भागं न लभेतेत्यर्थः । अत एव देवलोपि ।

अविभक्तविभक्तानां कुल्यानां वसतां सह ।
भूयो दायविभागः स्यादा चतुर्थादिति स्थितिरिति ॥

बीजिचतुर्थमभिव्याप्य दायविभाग इत्यर्थः । विभक्तानामपि संसर्गादिना सहवासे सतीयं व्यवस्था वसतां सहेति वचनात् ॥

Kátyáyana :—

"Should one's own [brother] die before partition, his share shall be allotted to his son, provided he had received no livelihood from his grandfather. But that [grandson] shall receive his father's share from his uncle or from his [uncle's] son; but an equal share shall be allotted to each of the brothers according to law. Or his [the

The family living in union

grandson's] son shall receive the share [in case his father be predeceased]; beyond him [succession] stops."

One's own (*i. e.*) brother. His son (*i. e.*) the brother's son. A livelihood (*i. e.*) a share. As it is necessary to know, what kind of share he shall receive, (Kátyáyana) says: 'His father's share.' His son (*i.e.*) the great grandson of the person whose estate is being divided, because the grandson has (already) been mentioned. Afterwards (*i. e.*) beyond the great grandson shall occur a stoppage; (*i.e.*) a stoppage of the succession. *The meaning is that the great-grandson's son does not receive a share.*

'Hence Devala also says:—

"Amongst members of a family, who reside together, being undivided or after having been divided, (on a first or) second (partition), shares of the common property shall be given (even) to the fourth (in descent). That is certain."*

'The meaning is, a distribution of shares shall take place down to the fourth (descendant) from the common ancestor.'

'From the words "residing together" it follows, that this rule holds good even for persons who have made a partition, and afterwards live together upon reunion or the like.'

With this doctrine the Madanaratna agrees; but the Mayúkha (Borradaile, Chapt. IV. Sect. IV. paras. 22 and 23) contends, that the passages of Kátyáyana and Devala, quoted above, refer to reunited coparceners only. The Mayúkha's opinion is however based on a forced explanation of the term "avibhaktavibhakta" in Devala's passage. Nílakaṇṭha takes it as a Karmadháraya compound, "those who were first undivided and became afterwards divided." The correct way to dissolve the compound is to take it as a 'Dvandva,' or copulative compound.

The correctness of the rule given above may be inferred also from the fact, that the great-great-grand-son in the male line of a divided person inherits only as a Gotraja-relation, after the wife, daughters, &c.

* See Colebrooke, Dig. Bk. V., Text 81.

The family living in union

(2.) The distinction between the rights of male coparceners and of the female members of the family rests on this, that the rights of the former are immediate, arising on the birth of each, while those of the latter are mediate, having their source in the necessity for a provision for a marriage portion or maintenance.

A reunited family.

§ 3. II. A reunited family may, according to the Mitákshará, Chapt. II. Sect. IX. para. 3, consist of a father and his sons, of brothers, and of nephews and paternal uncles, who, having once separated, have agreed to combine their interests again. According to the Mayúkha, Chap. IV. Sect. IX. para. 1, all persons, who once formed a united family, may reunite.

This difference of opinion depends on a variance of the interpretation of a passage of Bṛihaspati, quoted Mit. l. c. para. 3. Vijñánes'vara takes it as an exhaustive enumeration of the persons capable of reunion, whilst Nílakaṇṭha views it as a dikpradars'ana, *i.e.* an indication of principle, extending to analogous cases.

REMARK.

It has been held by the High Court of Bombay (Rep. III. A. C. J. 69), that the reunion must be made by the parties or some of them, who once lived in union. See to the same effect Jagannátha in Colebrooke, Dig. Bk. V. T. 430.

SEPARATION. Definition of.

§ 4. I. Separation is the dissolution of the state of union or reunion, the continuance of which is based on the will or acquiescence of the united coparceners.

How effected.

II. The separation of a family united or reunited may be effected—

(1.) *By the will of all the members.*

(2.) *At the desire of one or more members only.*

SEPARATION. *Times of.*

(1.) Separation by the will of all the members, whether undivided or reunited may take place at any time; provided there be no pregnant widow of a deceased coparcener. In that case it must be deferred until the delivery of the widow.*

It cannot be prevented by third parties, however interested they may be in the estate, *e. g.* by creditors or mortgagees, since their equitable rights and remedies are not impaired (see below § 7, II. 1).

(2.) As regards separation at the desire of one or several coparceners only, the head of a family, a father, grandfather, or great grandfather may separate from his descendants at any time.†

The same rule holds good in respect to one or more members of a family, consisting of brothers or collaterals only. ‡

A son living in union with his father, who is head of the family, may demand a separation and a division of the ancestral property at any time, § of the self-acquired property, under certain conditions only, viz.—

(*a.*) If the father be indifferent to wealth, his wife past child-bearing, and the daughters married.¶

---

* May. Chapt. IV. Sect. IV. para. 37, and compare para. 35.

† Mit. Chapt. I. Sect. II. paras. 2 and 7; May. Chapt. IV. Sect. IV. para. 8.

‡ Mit. Chapt. I. Sect. III. para. 1.

§ Mit. Chapt. I. Sect. V. paras. 5—8; May. Chapt. IV. Sect. IV. para. 4; I. M. H. C. R. 77.

¶ The doctrine, given here, is that of the Mitákshará as explained by the Subodhiní (Colebrooke, Mit. Chapt. I. Sect. II. note to para. 7). The Víramitrodaya differs from this view by rejecting the division (*a*), while the Mayúkha, Chapt. IV. Sect. IV. para. 3, divides (*a*) into two subdivisions.

SEPARATION. *Times of.*

(*b*.) If the father be incapacitated by bodily ailments, extreme old age, insanity, or by addiction to vice,* or loss of caste.

The last of these conditions would, however, now perhaps be inoperative, as loss of caste according to to Act XXI. of 1850 does not affect a man's civil rights.

A grandson, living in union with his grandfather, or a great grandson with his great grandfather, may similarly demand a partition, provided his own father, or his father and grandfather, be dead.

Till then he cannot demand a partition notwithstanding his right in the property, because the intervening heir obstructs his complete title. †

A son, a grandson, or a great grandson may separate, without receiving a full share, at any time. ‡

REMARKS.

Fundamental principle.

(1.) It must be considered a fundamental principle, that each coparcener has power only to effect his own separation from the family, and not to enforce a separation amongst the other coparceners against their will.

In the Mitákshará, Chapt. I. Sec. II. para. 1, it is stated, that "When a father wishes to make a partition, he may at his pleasure separate his children from himself, whether one, two, or more sons," and the comment on this by Bálambhaṭṭa, as translated in the note, is, that he may "make them distinct and several by giving to them shares

* The Mitákshará says, "if he is addicted to vice." The Víramitrodaya explains this to mean 'loss of caste.' But it is probable that the Mit. means to include besides loss of caste, the case of a notorious spendthrift and evil-liver, as 'interdiction' is otherwise known to the Hindu Law.

† Mit. Chapt. I. Sect. II. paras. 1 and 7; May. Chapt. IV. Sec. IV. paras. 1—3; Mit. Chapt. I. Sect. V. para. 3 note.

‡ Mit. Chapt. I. Sect. II. paras. 11 and 12; May. Chap. IV. Sect. IV. para. 16.

SEPARATION. *Fundamental principle.*

of the inheritance." From this it would at first sight appear, that a father has a right not only to sever himself in interest from his sons, but also to effect a separation amongst the sons independently of their desire or assent. This however would not be a correct inference; the entire comment of Bálambhaṭṭa runs thus:—

दायभागदानेन पृथक्कुर्यात् । तत्रावध्याकाङ्क्षायामाह आत्मन इति ।
तदनन्तरं तेषां मिथ ऐक्यं भेदो वेत्यत्र नाग्रहोऽस्येति भावः ॥

'(If) he make them distinct by giving to them shares of the inheritance. As the limit of this (separation) is desired to be known, he (Vijñánes'vara) adds: "From himself."'

'The purport is, that the (author) does not stop to consider whether they (the sons) remain afterwards united or separate.'

This is evidently not conclusive either of separation or of union in such a case.

It is, no doubt, competent to a father to distribute, to a certain extent, his self-acquired property at his own pleasure, amongst his sons. But it does not follow, that, by such a distribution, a separation amongst them individually and independently of their own desire will be effected. There appear to be no texts, which lay down such a rule, and Jagannátha in Colebrooke's Digest, Book V. Chapt. VIII. Text 430, explicitly recognises the doctrine of a continuance of union in a family, notwithstanding the separation of individual members and the allocation to them of their shares in the estate. He makes separation or non-separation depend on the free consent of the coparceners, resting in the absence of explicit texts on the reason of the law, a principle recognised in the Hindu, as well as in the English jurisprudence.*

This principle, it must be admitted, is hard to reconcile with a recent judgment of the High Court Bombay, Lakshmíbáí *vs.* Gaṇpat Morobá, Bombay H. C. Rep. IV.

---

* Colebrooke, Dig. Book II. Chapt. IV. Text 17.

O. C. J. 150. In this case it was laid down, that a grandfather could by a will distributing a share of ancestral property, received by him on a partition, in equal portions among his grandsons, effect a separation amongst the latter. The reasoning of the learned Judge has, however, not been concurred in by the Court on appeal, and the ultimate decision has been based on different grounds. The views, above stated, are conformable to those set forth by Sir T. Strange, H. L. 193 and 204, the authority quoted by whom, however, is not applicable.

SEPARATION. *Fundamental principle.*

(2.) The case of a great grandson is not expressly dealt with in the Hindu lawbooks, but it rests on the same principle as that of the grandson, viz., on the doctrine of representation.

Great grandson.

(3.) In the case of minor coparceners, it would certainly tend to convenience, if the doctrine, apparently upheld by the Madras and Bombay High Courts,* that a minor coparcener is to be represented in partition by his guardian, could be based on any explicit texts. All, however, that can be deduced from the original authorities appears to be that the interests of the minor shall be duly regarded, and shall, if necessary, be protected by the sovereign power. His position is, in fact, declared to be analogous to that of absentees, and the rules proceed on the assumption that his assent or that of a guardian for him, is not essential.† Mr. Colebrooke, in an opinion, quoted at 2 Strange H. L. 362, says, that "the sovereign or his representative, as *guardian of the minor* is competent to authorise a partition," and for this opinion he refers to a text of Kátyáyana, Digest, Bk. V. Chapt. VIII. T. 453. But this text points to the necessity of protecting the minor's interest, if, contrary to the ethical obligation to remain undivided during the minority, a partition should actually be made by the adult coparceners, rather than to any necessity for an assent expressed on behalf of the minor. This text, indeed, and the one preceding it, with

Minors.

* 2 Madras H. C. R. 182, quoted B. H. C. R. IV. O. C. J. 159.

† Víramitrodaya, quoted below, II. Dig. Chapt. I. Sec. I. Q. 7; II. Strange H. L. 341.

SEPARATION. *Minors.* their accompanying commentaries, imply a valid partition by the will of the adults alone.

A partition, demanded on behalf of a minor by his guardian or friends, cannot usually be enforced against the will of the adult coparceners. But such a demand may be enforced, when it is necessary to prevent malversation or jeopardy to the minor's interests.* This opinion has been expressed by Mr. Colebrooke, also, in the passage quoted above. But it rests on the reason of the law, not on any express texts.

Absentees. (4.) The absence of one or more coparceners does not bar partition,† if it is desired by the coparceners present. All that the law requires, is that their equitable shares, like those of the minors, be set apart in the division. For the definition, of what constitutes absence in a foreign country, enabling the coparceners present to dispense with any expression of assent on the part of the absentee, see Sir T. Strange H. L. 188; Colebrooke, Dig. Bk. II. Chapt. III. T. 26 and 27. The great change of circumstances that has occurred in recent times, would make it necessary, for practical purposes, to fall back in this case as in others on the reason of the law, the essential part of which here is evidently the supposed impossibility of communicating with the absent co-sharer. The remarks of Sir T. Strange, l. c., as to the periods of twelve and twenty years, appear to refer to the propriety or impropriety of a distribution of the property, without reserving the absentee's share. There is no text which enjoins the postponement of the division for the advantage of an absentee, and his interests are otherwise sufficiently protected.

Wives, mothers &c. (5.) Wives, mothers, grand-mothers, sisters, &c., the female members of a united family, entitled to shares on partition, are still not invested with any power to demand a partition of the estate. This disability rests on the principle, that males alone in a united family are

* 1 Mad. H. C. R. 105; 3 Mad. H. C. R. 69 and 94.

† Viramitrodaya, quoted below II. Dig. Chapt. I. Sect. I. Q. 7.

regarded as heirs, with rights untransferable to females. The source of the right of females to a share on partition is the necessity to secure for them a certain provision, which otherwise might fail.

SEPARATION.

(6.) Disqualifications to inherit operate equally to exclude from a share on partition, and, consequently, from the right to demand a separation. See I. Dig. Introduction, p. xlix.

Disqualifications for demanding a separation.

According to Strange, Man. H. L. § 273, and S. G. Grady, p. 318 and 367, a person, also, who has fraudulently concealed a portion of the family property, loses, on discovery of such fraud, his right to a share. Sir T. Strange, also H. L. p. 232, seems to be of opinion, that the Mitákshará, Chapter I. Sec. IX. paras. 4, 5, and 12, agrees with this rule, which is certainly laid down by Manu, IX. 213.

But, with regard to the Mitákshará, it would seem to us, that in this work the paras. 4—12 do not refer to the loss of the right to a share in case of fraud practised by a co-sharer, but to the criminality of the act only. The author first states the positive rules regarding the treatment of fraudulently concealed and recovered property in paras. 1—3, and then he goes on to combat the opinion held by some Hindu lawyers, that such a concealment of property by a coparcener is not criminal. He is forced to do this, because the text of Yájñavalkya does not touch on the point, and, for the same reason, he is also forced to base his arguments on the verse of Manu (para. 5), though the doctrine contained in the latter is partly at variance with his own.

The argument of the Mitákshará has been understood in this manner by Mitramis'ra also, who after repeating the substance of Mitákshará, l. c. paras. 1—12, adds, Víramitrodaya, f. 220, p. 2, l. 4:—

राज्ञे तु भागिभिर्न निवेदनीयम् । राज्ञे निवेदितमपि तेन सामादिनैव दापनीयमिति मैत्र्यविच्छेदाददृष्टप्रयोजनकमेव कात्यायन आह ।

बन्धुनापहृतं द्रव्यं बलान्नैव प्रदापयेत् ।

SEPARATION.

"But the co-sharers ought not to inform the king, (if fraud has been committed by one of them). But even if an information has been laid, he (the king) ought to cause it to be restored by kind exhortations and the like. For Kâtyâyana gives a rule, the visible object of which is to enjoin that kindness only ought to be used, saying:—

"He (the king) shall never use force to cause the restoration of property taken away by a relation."

Hence it appears, that according to the authorities prevailing in the Bombay Presidency, a co-sharer, practising fraud, does not lose his right to a share.

The same has been held also by the M. S. A. (Dec. of 1858, p. 118): see Sir T. Strange, H. L. 4th ed., p. 348: and is recognized as law by Jagannâtha in Colebrooke, Dig. Bk. V. Commentary on T. 376 and on T. 378 *ad fin.*

Will to effect a separation.

§ 4. III. The will of the united co-parceners to effect a separation may be—

1. *Stated explicitly.*
2. *Or implied.*

1. As to *express will*, it may be evidenced by documents or by declarations before witnesses. In some of the older cases it was held, that the execution of a deed by the coparceners and a distribution in specie were not merely evidence of a partition, but were essential to make it valid. But this doctrine has, for some time, been abandoned, and it is now recognised, that all, which would be evidence of an assent or expression of will in other cases would be equally so in a case of partition,* and that the expression of will, whether immediate or implied, is the sole criterion of division. This has been carried so far, that, where a partition had

* IV. Moore I. A. 68. 1 Madras H. C. Rep. 100. Sutherland's Pr. Co. Judgments, 657; and as to the vesting of a right by an agreement for partition p. 172. See also May. Chapt. IV. Sect. III. para. 2, quoted in a corrected translation under II. Dig. Chapt. III. Sect. 3, Q. 6.

been planned and agreed to by co-parceners, but not actually effected, the widow of one of the co-parceners, who died in the mean time, was allowed to recover the share allotted to her deceased husband.*

SEPARATION. *Will to effect a separation.*

REMARK.

By some of the Hindu lawyers a separation such as to give one or more members their several shares is regarded as necessarily involving a general partition. Those who have not separated are on this theory looked on as re-united: *See Coleb. Dig. B. V. T.* 433 *sub. fin.* Jagannátha does not adopt this view, and it involves perhaps a certain confusion of thought as pointed out in the case above quoted (Suth. P. C. J. 657); but it rests also, probably, to some extent on the general necessity, under the Hindu law, of seisin or possession to validate any change of title; no ownership of any definite share being predicable of a particular coparcener while united. Compare also above p. vi. sqq., and see the case at C. W. R. IX. C. R. 483.

2. As to *implied will*, the Hindu authors are prolix in their discussions of the circumstances, from which separation or union may be inferred.† According to them the 'signs' of separation are:—

(*a*) The possession of separate shares.

(*b*) Living and dining apart.

(*c*) Commission of acts incompatible with a state of union, such as trading with or lending money to each other, or separately to third parties, mutual gifts or suretyship. They add also giving evidence for each other, but from this in the present day no inference can be deduced.

---

* Bombay H. C. Rep. I. 189; see also the decision of the Privy Council, 17th Nov. 1866, given in Sutherland, loc. cit., and W. R. VIII. Pr. Co. 1. But see also C. W. R. IX. C. R. 62 and Madras H. C. Rep. vol. II. p. 325.

† Mit. Chapt. II. Sect. XII.; May. Chapt. IV. Sect. VII. paras. 27—35.

SEPARATION.
Will to effect a separation.

(*d*) The separate performance of religious ceremonies, *i. e.* of the daily Vais'vadeva, or food-oblation in the fire preceding the morning-meal; of the Naivedya, or food-oblation placed before the tutelary deity; of the two daily morning and evening burnt-offerings; of the S'ráddhas, or funeral oblations to the parents' manes, &c.

None of these signs of separation can be regarded as, by itself, conclusive. Living and dining apart, on which the Shastris appear to set great value, may justify an inference that separation has taken place, but it is not conclusive of the fact, since many coparceners live and dine apart, sometimes in the same village or house, for the sake of convenience. Other reasons, too, may necessitate the same arrangement, *e. g.* Government service, taken by one or more of the coparceners.

The separate performance of the Vais'vadeva sacrifice, of S'ráddhas and other religious rites, is still less conclusive. At Dig. Chapter IV. Q. 6 infra, a passage of Bhaṭṭojídíkshita is quoted, according to which coparceners, living apart, may or may not perform the Vais'vadeva each for himself, and, in the present condition of Hindu society, the performance of all religious rites has become so lax and irregular as to afford no safe ground for inference. Separate contracts, entered into by coparceners mutually or with third parties, constitute, according to I. Macnaghten, H. L. 54, and Sir T. Strange, H. L. p. 225—227, the most certain evidence of a partition. But even these raise no conclusive presumption *per se*, since it is consistent with a condition of union, that a coparcener should, concurrently, possess separate property (avibhájya), which implies separate transactions.

SEPARATION. *Will to effect a separation.*

As no one of the marks of partition above enumerated can be considered conclusive, so neither can it be said that any particular assemblage of these alone will prove partition. It is in every case a question of fact, to be determined like other questions of fact, upon the whole of the evidence adduced, circumstantial evidence being sufficient. Morley's Dig. Partition, pp. 484, 485; II. Borradaile, 656. This principle has been followed by the Privy Council in Rewana Prasad *vs.* Radha Bibi, and in other cases, and, in effect, supersedes the artificial rules of the Hindu Law.*

On the other hand, from the separate possession, by individual members of a family, of portions of the property once held in common, a presumption, though not an indisputable presumption, of partition arises.† This presumption is strengthened by length of time, and Nárada, XIII. 41,‡ states, that a continuous separation for ten years is a proof of partition. But this verse is not quoted in any of the modern compilations of Hindu Law.

The fact that certain portions are admittedly held in severalty does not, it has been said, rebut the presumption of non-partition as to the rest of the family property (C. W. R. VII. C. R. 451), and separate enjoyment merely as a matter of arrangement for the convenience of the family will not constitute partition (C. W. R. VI. C. R. 144). This is the normal condition of a Khoti estate in Ratnagiri and will not prove a partition as intended to be permanent (B. H. C. R. V. A. C. J. 71).

---

* At C. W. R. VIII. C. R. 116 there is a case of a coparcenary converted by agreement in a simple mercantile partnership.

† S. G. Grady, H. L. I. p. 420.

‡ I. Digest, p. 357.

SEPARATION. *Will to effect a separation.* This last decision must, so far as it extends, qualify the rulings at C. W. R. VIII. C. R. 385, and IX. 88, and the old case at II. Borradaile 713, in which separate collections, and even a division of the income derived from a village, were held to be sufficient proofs of a partition.

At present, where there had been a really separate enjoyment of any portion of the patrimony, a suit would ordinarily be barred by the Limitation Act, XIV. of 1859, Sect. I., para. 13, after the lapse of twelve years,* and, as to the general principle, it would seem that the older Bombay decision was more strictly in accordance than the recent one with the Hindu Law as viewed by native commentators. A division of the proceeds is a recognized mode of distribution on a separation of the family: *see below*, § 7; and in the case at I. B. H. C. R. 43 it was held that where a plaintiff admitted having had separate possession for sixteen years of a portion of the ancestral estate, it lay on him to prove that the family had remained undivided.†

---

* C. W. R. III. C. R. 173.

† It does not appear that the Hindu, like the Roman, lawyers elaborated any very clear theory of possession, distinct from proprietorship, as itself conferring rights. In the Vyavahâra Mayûkha, Chapt. II. Section II., possession is regarded merely as a means of proof, comparatively valueless without a title otherwise established. A law of prescription, however, is distinctly recognized; Coleb. Dig. Bk. I. T. 113, Bk. V T. 395, 396; defined for the Bombay Presidency by Reg. V. of 1827, and in the case of conflicting titles possession gives him who holds it the preference. Coleb. Dig. Bk. I. T. 128 sqq. In the case of Rajah Prada Vencattappa *vs.* Aroovala Roodrappa Naidoo (Sutherland's Pr. Co. Judgments, p. 112) it is laid down that "the title of possession must prevail until a good title is shown to the contrary." This is an adoption of the English law, the doctrine of which on this point, as Sir T. Strange (H. L. I. 38) observes, is substantially the same as that of the Hindu Law. As to possessory actions there have been

SEPARATION. *Total or partial.*

§ 4. IV. The separation may be total or partial, *i.e.* it may extend to a partition of the whole of the property, or only to a portion of it. In the latter case the mutual rights and duties of the former coparceners in relation to the undivided residue of the estate remain generally as before partition.* A partial division, however, cannot be enforced: the coparcener must claim the whole of his share. (*Bombay Sel. Ca. p.* 153; *Sp. App.* 3948 *27th Sept.* 1858.) See below, *Liabilities on Inheritance.*

REMARK.

Though partial division is of very frequent occurrence in practice, the law books do not contain any special rules on the subject. But that it is not a mere modern innovation may be inferred from the passages, relating to 'naturally indivisible property' in the older Smṛitis.

In the absence of definite authorities, it is necessary to fall back here, as in other cases, on general principles.

One of the most important questions arising in connexion with this subject, is that of whether the law regulating

---

very conflicting decisions. Compare C. W. R. VIII. C. R. 386 with the same volume p. 370, C. W. R. IX. C. R. 602, and II. M. H. C. R. 313; and see also C. W. R. IX. C. R. 71 and Special Number p. 20. For Bracton's theory of possession the reader may refer to Reeves's History of the E. Law, V. I. p. 318, and it seems necessary to follow this down to the present day in order fully to understand how questions of rights arising from possession are likely now to be dealt with in the High Courts, and the Privy Council. Savigny, in his famous treatise on Possession (Sec. 2, 38), relying on Ulpian's dictum "*Nihil habet commune proprietas cum possessione*" rejects the common theory that possession raises a presumption of ownership; but it seems doubtful, at the least, whether the refinements of the Roman law on this subject would be allowed any practical influence in the Courts. Though the English law of possession is plainly derived in the main from the Civil Law as understood by its Commentators of the 13th and 14th centuries, it, and not the Civil Law, must now be looked to for principles where the Hindu Law does not supply distinct guidance.

* Sutherland's Pr. Co. J. 174, 657.

SEPARATION *Total or partial.*

the succession to an undivided or that applicable to a divided male's estate regulates the devolution of an undivided residue. Mr. Colebrooke, Sir T. Strange, II. 387, states, that opinions have differed on this subject, but that the former view seems preferable. Most of the Shastris (see I. Dig. Chapt. I. Sec. 2, Q. 9, 11, 14, 22), hold the same opinion, in favour of which the following considerations also may be urged. The law which bases partition on the will of the coparceners, extends the partition no further than such will. If this extends only to a portion of the estate, their mutual rights and duties with respect to the remainder will be unaltered.*

Partition, final.

§ 4. V. A partition once agreed to is final,† except in the case of a mistake or fraud, which has materially affected the distribution. In both cases a redistribution may be claimed by any parties injured, which, however, extends only to the portion overlooked or fraudulently abstracted.‡

It is subject to a proportional deduction from each coparcener's share on the birth of a posthumous son. See below; *Duties and Rights arising from the Separation.*

REMARK.

In Hindu, as in English law, fraud vitiates every transaction. Manu, VIII. 165; Colebroooke, Dig. B. IV. T. 184.

The common property.

§ 5A. The common property may be distributable or undistributable. In both classes it may be—

I. *Ancestral*, which may be—
 1. Inherited.
 2. Or recovered.

II. *Self-acquired.*

---

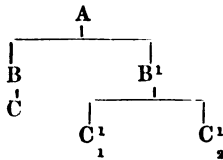
* Rewana Prasad *vs.* Radha Bibi, Sutherland's Pr. Co. J. 174; IX. Moore, I. A. 539; S. G. Grady, H. L. I. 262; II. M. H. C. R. 325.

† Manu, IX. 47; Sutherland, Pr. Co. J. 355.

‡ Mit. Chapt. I. Section IX. paras. 1 and 2; Mayúkha, Chapt. IV. Sect. VII. paras. 24 and 26.

PROPERTY. *Ancestral, Inherited.*

I. 1. Ancestral property, as amongst descendants comprises property, transmitted in the direct male line from a common ancestor, and accretions to such property made with the aid of the inherited ancestral estate* (see below, *Self-acquired property*). Thus in the case of a father, head of a family, property inherited from his father or grandfather, is ancestral property, however acquired by its previous possessors. On the other hand property, inherited by him from females, brothers, or collaterals, or directly from a great-great-grandfather, appears to be subject to the same rules as if self-acquired. Ancestral property, in fact, may be said to be co-extensive with the objects of the apratibandhadáya, or 'unobstructed inheritance.'† The view, here stated, agrees with that arrived at by Jagannátha,‡ after a discussion of the contrary doctrines held by other lawyers. This discussion itself shows, however, that there is much to be said on both sides, and the question must be regarded as one still in controversy. Those, who hold, that all property descending to the father from relations, ranks as ancestral property, interpret the text of Yájñavalkya,§ which relates to the grand-father's

* In a family descended as follows—

C^1_1 having purchased property out of the profits of the family estate it was held that C was entitled as against C^1_2 to a moiety. N. W. P. R. for 1861, p. 565.

† I. Dig. Introd. xxxix. sqq.

‡ Colebrooke, Dig. Bk. V. Chap. II. T. 103.

§ Mit. Chapt. I. Sect. V. para. 3.

PROPERTY. *Ancestral, Inherited.*

property, as an example of the principle, that all property taken by right of affinity* is to be regarded as ancestral. Those, on the other hand, who maintain that property regularly transmitted from ancestors in the male line, and that alone is ancestral property, understand the text to imply affinity only of that closest kind, which its terms necessarily import, namely that existing between an ancestor and his first three descendants.†

On considering the former of these conflicting views, it presents this difficulty, that it assigns, in many cases, to a son equal power with his father over property, which, but for his father's existence, could never come to him, while in the example given in the text, the intervention of the father is immaterial. The property, held by a grandfather, must come to his grandson, whether the intervening descendant survive or not, whereas the property, *e. g.* of a great-grandfather, descends to his great-grandson, through his daughter, only if first inherited by his daughter's son.

It may further be objected, that the equal right of the grandson with his father in the property of the grandfather is but an exception to the general rule, supported by numerous texts, of the father's independence and supremacy over his family and estate. It would appear dangerous, to extend the exception, in the absence of explicit texts, on the strength of an interpretation.

An objection, commonly urged against the second view, is, that, by classing property inherited by the father from relations with self-acquired

* See also Colebrooke, Dig. loc. cit.

† See also Colebrooke, Dig. loc. cit. sub finem.

PROPERTY. *Ancestral, Inherited.*

property, an undue extension is given to the latter term, since acquisition (arjana) implies an individual effort. Jagannátha, l. c., felicitously meets this objection, by showing that such an extension must be allowed in other cases, such as those of a priest inheriting from his Yajamána, *i. e.* the person for whom he sacrifices, and of an A'chárya or religious teacher inheriting from his pupil. For it is impossible to class such inheritances as ancestral property, since the text, by instancing a grandfather, whose relationship is one of blood, cannot imply the spiritual relationship, existing between a teacher and his pupil, or between a priest and his Yajamána.

The nature of ancestral property, as between a father and his sons, is not affected by the circumstance of a partition having taken place between the father and his coparceners. The general principle is laid down by Yájñavalkya,* "The ownership of father and son is the same in land which was acquired by the grandfather, or in a corrody or in chattels, which belonged to him." Vijñánes'vara, in his remarks introducing the text quoted, explicitly states, that it is given to meet the case of a doubt that might otherwise be felt, in the case of a separation having taken place between a father and a grandfather. The doctrine has been correctly apprehended by the Calcutta H. C., in a decision at C. W. R. VI., C. R. 73, where the authorities are discussed at length. In the case of the Rája of S'ivagangá, the Privy Council laid down the rule, "When property belonging in common to a united Hindu family has been divided, the

* Mit. Chapt. I. Sec. V. para. 3.

PROPERTY. divided shares go in the general course of descent of separate property." * But from this it must not be understood, that the nature of the property, as ancestral estate, is changed. Such a view, originally held in the case of Lakshmíbáí *vs.* Gaṇpat Morobá and others, Bombay H. C. R., IV. O. C. J. 150, was dissented from on appeal by Sir R. Couch, C. J.

Ancestral, Recovered. § 5 A. I. 2. As regards *property recovered*, the cases must be distinguished of—

(*a*) Recovery by a father, head of the family.

(*b*) By another coparcener.

(α) With the aid or without the aid of the patrimony.

(β) Of moveables or of immoveables.

2 *a*. Ancestral property recovered by a father, head of a family, ranks as self-acquired.†

This rule, however, is in the Mayúkha qualified by a text cited‡ from Bṛihaspati, which imposes the condition, that such a recovery must have been made without the aid of the ancestral property; compare also Dáyabhága, Chap. VI. Sec. II. paras. 31—35, and Jagannâtha's Commentary, Colebrooke, Dig. Bk. V. T. 25.

2 *b*. Ancestral property recovered by another coparcener with the aid of the patrimony, becomes an accretion to the common estate.

Immoveables, recovered by such a coparcener without the aid of the patrimony, but with the acquiescence of the other co-sharers, rank likewise

---

* IX. M. I. A. 609.

† Mit. Chapt. I. Sec. V. para. 11.

‡ May. Chapt. IV. Sec. IV. para. 5.

PROPERTY. *Ancestral, Recovered.*

as an accretion to the common property, subject to a deduction of one-fourth for the acquirer.* This rule has been recognised by the Bombay H. C. in Special Appeal No. 534, 20th September 1864.

It seems probable from the wording of the texts, upon which this doctrine rests, that they contemplate the cases only of property forfeited or withdrawn from the family estate otherwise than by voluntary and valid alienation. This view seems to be strongly supported by the words "hṛita" (*i.e.*, that which has been taken or seized), and "nashṭa" (that which has been lost), and "uddharet" (if he rescue or win back). Though there is no explicit rule which enables a member of a united family purchasing a portion of the patrimony, formerly sold, out of his separate means, to enjoy it, as in the case of another acquisition, free from claims to partition by his coparceners, yet neither is any express limit set to such enjoyment, and it would probably now be held, that such property stands on the same footing as any other purchased property of his separate estate. A contention to the contrary was abandoned in the case in C. W. R. VI, C. R. 58; and a case at II. Strange, H. L 377, with the comments of Messrs. Colebrooke and Ellis, shows that "recovered property" is of the nature of that which should have been, but could not be, divided, owing to its detention by strangers.

The introduction of the condition of acquiescence on the part of co-sharers is due, probably, to the necessity of guarding them against any underhand proceeding by one of their number.† Reco-

---

* Mit. Chapt. I. Sec. IV. para. 3; May. Chapt. IV. Sec. VII. para. 3.

† Strange, II. L. 217.

PROPERTY. *Ancestral, Recovered.*

vered property, it has been held, does not include what is regained from one claiming as a member of the family; only property held adversely by strangers ; and one who, in a suit brought by him, purposely ignores his co-heir, is not entitled to any extra share. C. W. R. IX. C. R. 69.

Ancestral moveables, recovered by a coparcener, without the use of the patrimony, with the consent of the co-sharers, become his separate property.

REMARK.

Mr. S. G. Grady, H. L. I. p. 353, appears to suspect that the author of the Mitákshará has misquoted Manu IX. 209, in support of his view of the father's independent power over ancestral property recovered by him. The passage is, however, correctly quoted, and his explanation of it, though differing in terms, agrees in substance with that of Manu's commentator Kullúkabhaṭṭa. The translation of Sir W. Jones does not correctly render the sense of Manu's words, inasmuch as he has translated the word putraiḥ, "with his sons," by "with his brethren."

Self-acquired.

§ 5 A II. *Acquired,* as distinguished from *inherited* or *recovered* property has a two-fold character as being the acquisition—

(*a*) Of a father, head of a family.

(*b*) Of any other coparcener.

II. *a.* Self-acquired property as between a father and his sons, includes all separate acquisitions by the father, as well as ancestral property recovered and property taken by inheritance, but not in the direct male line of descent.

The acquisition or recovery must have been made without the aid of the family estate ; otherwise the property will rank as ancestral. In the Mitákshará this qualification is not distinctly

PROPERTY. *Self-acquired.*

drawn out. The general rule only is laid down, that the right of sons and grandsons in the grandfather's estate is equal, without any express provision for accumulations or increments of the estate. The section (IV. of Chapter I.) which treats of property not subject to partition, since it lays down no explicit rules regarding acquisitions made by a father, might be taken as relating only to independent or equal coparceners, such as brothers or collaterals. But in the Mayúkha, Chap. IV. Sec. IV. para. 5, the text of Manu, which excludes property recovered by a father from ancestral property, is modified by a text of Bṛihaspati, which declares, that such recovery must take place through the father's own ability, and without the use of the patrimony. The effect would seem to extend to the case of separate acquisitions, made by the father with the aid of the ancestral estate. In a Calcutta case (Marshall 317, quoted at C. W. R. VIII. C. R. 456) it was said that ancestral property did not include that purchased out of the income; but this has been overruled; C. W. R. l. c., and VI. C. R. 256.

II. *b*. Self-acquired property, as between coparceners generally, includes gifts of friends, or at marriage, gains of science, valour, and chance, obtained without the use of the family property.* If in the acquisition of property directly gained by science, valour, &c., the result is in a considerable proportion evidently due to the use of the family estate, an equitable distribution of such acquisition between the family and the separate estates, should, it appears, be made. Such seems to be the

* Mit. Chapt. I. Sec. IV. paras. 1—15 ; May. Chapt. IV. Sec. VII. paras. 1—14.

PROPERTY. *Self-acquired.*

effect, when interpreted according to the reason of the law, of the text of Vásishṭha, cited Mit. l. c., para. 29, on which see Mr. Ellis's remarks quoted at 2 Strange, H. L. 338, and Grady, H. L. I. p. 362. The difficulty felt by the latter author as to the relation of Mit. Chapt. I. Sect. IV., paras. 29 to 31, may be solved with Mr. Colebrooke and Sir T. Strange by regarding the former paragraph as referable to a *wholly separate acquisition*, obtained by the aid of the family property, whereas the latter refers to augmentations, blending as they accrue with the original estate. In Colebrooke, Dig. B. V. T. 354, 355, Jagannátha seems to lay down that what is acquired without any aid at all from the patrimony is separate property; that what is acquired with such aid, whether previous or concurrent, is partible with the learned brothers; and that if the aid has been both previous and concurrent, the acquisitions are partible with all the brothers. In commenting on the text of Vásishṭha, Jagannátha (T. 356) says that aid from the patrimony includes supplies previously received out of it, and under T. 359 he assumes that the double share is in an acquisition made without using the patrimony concurrently, or as capital. In the case at II. M. H. C. R. 56 the subject of the gains of science is discussed at great length, the conclusion being that such acquisitions made by one supported and instructed at the expense of the family, form part of the joint estate. At IV. M. H. C. R. 5 it is said that any property acquired by a Hindu while drawing an income from the family is joint property. In a case at C. W. R. V., C. R. 278 it was ruled that an allegation of separate acquisition by the use of a gift must be proved, and in Dhurm Das Pande *vs.* Mussamut Shama Soondri Debia (Suther-

land's P. C. J. 147) that, when property has been acquired by a coparcener in his own name, the criterion for determining its character is the source of the funds employed.

PROPERTY. *Self-acquired.*

Naturally indivisible.

§ 5 B. Naturally indivisible property is that which cannot be distributed retaining its essential characteristics. In the Hindu law there are enumerated common roads or ways, tanks, wells, pasture-ground, hereditary offices, (vṛitti, vattan), clothes in use, books, tools, ornaments, vehicles and furniture.* To these may be added indivisible rights arising from obligations contracted towards the common ancestor, or towards the family whilst in a state of union. See Colebrooke on Oblig. Art. 343. Pothier, Obl. Art. 294. C. W. R. VII. C. R. 314. Bombay Sel. Cases, p. 192 (1*st Edition*).

As regards hereditary offices and their emoluments in the Bombay Presidency, these are now regulated by positive enactments of the Legislature, see Regulation XVI. Sec. 20 of 1827, and Act XI. of 1843, by which a prohibition is imposed on Wattan property's leaving the family of the office holders, and provisions are made for the disposal of the proceeds between the office holder and the other co-sharers.

As regards clothes, furniture, vehicles, ornaments, books and tools, it must be understood that an equitable distribution† of them or of the proceeds of their sale is sanctioned, when they are numerous and of value, or form the sole property of the family. Property subject to partition but the exist-

---

* May. Chapt. IV. Sec. VII. para. 15; Mit. Chapt. I. Sec. IV. paras. 17—20.

† May. l. c., paras. 22 and 23; Mit. Chapt. I. Sec. IV. paras. 17—19.

PROPERTY. *Naturally indivisible.*

ence of which was not known, and which could not therefore be included in a general partition, is on its discovery to be distributed, and in the same proportions as that actually divided.

LIABILITIES ON INHERITANCE.

§ 6. The liabilities or charges on the common property, distributable on division, include the following—

1. Debts for which the coparceners at large are liable, must, in general, have been incurred before partition, by a father, or other managing member of the family for the common benefit.*
2. Provision must be made for relations of the coparcener, entitled to a portion or maintenance.

Debts.

1. The Hindu Law lays down broadly that sons and grandsons shall discharge the obligations of their ancestors,† except where they have been contracted for immoral purposes,‡ and this duty is not altered by a partition amongst the sons. In a case at C. W. R. XI. C. R. 125 three brothers had separated while a decree against their father remained unsatisfied. In execution the shares of two of the brothers were sold. The proceeds having exceeded two-thirds of the amount of the decree, it was held that the excess could be recovered by the two brothers from the share of the third, even though this had passed to a stranger, by a sale made before the execution was levied. (See Coleb. Dig. Bk. I. T. 182.)

In the Bombay Presidency the liability has been limited by Bombay Act VII. of 1866, under which

---

* May. Chapt. IV. Sec. VI. para. 1.; May. Chapt. V. Sec. IV. para. 20.

† May. Chapt. V. Sec. IV. para. 12.

‡ May. l. c., para. 15.

LIABILITIES. *Debts.*

an heir is responsible only to the extent of the assets received by him; and his property cannot be encumbered by the father except for good reasons into which the encumbrancer is bound to inquire. See C. W. R. IX. C. R. 511, 471, and X. C. R. 58.

In the case of a united family consisting only of brothers or collaterals, it has been laid down, that the presumption usually arises of a debt incurred by a managing member being for the benefit of the family, but that in the case of a minor coparcener's interests being affected, the creditor, seeking to enforce the liability, must prove that it was *bonâ fide* incurred by the manager, or at least, that there were good grounds for supposing it to have been so incurred.* Under the Bombay Act, above quoted, Sec. 5, the liability of a coparcener, as to debts contracted before he was 21 years of age, is limited to the amount of the portion of the common property received by him.

For a debt, incurred by any member of the family, under the pressure of distress, all members are liable,† and the property even after partition.

Provisions for relations &c.

2. Certain relations, though not themselves entitled to definite aliquot shares of the common property, are yet entitled, while the family is united, to maintenance or provision by way of marriage portion, and this right continues to

---

* S. G. Grady H. L. I. p. 81; I. M. H. C. R. 398; C. W. R. VII. C. R. 121; VI. C. R. 193; Sp. App. No. 3918, 6th July 1858.

† May. Chapt. V. Sec. IV. para. 20; Colebrooke, Dig. Bk. V. Ch. VI. T. 373, Com. *ad fin.*; see also under the three preceding Texts, Bk. I. Ch. V. T. 181, 193, 194; and I. Strange H. L. 276. See also Sp. App. No. 3265, III. Bombay S. D. C. 346.

LIABILITIES. *Provisions for relations &c.* subsist, notwithstanding an agreement for partition amongst the co-sharers. To this class belong :—

(*a*) All persons disqualified from inheriting.

(*b*) Female relations not entitled to a specific share.

Regarding the former see I. Digest, Introd. p. lxix, lxx.

Female relations not entitled to a specific share, but to maintenance, are widows of predeceased sons and other descendants (unseparated) of the common ancestor, and daughters of such persons, in case of their having left no sons.* Such daughters are also entitled to a marriage portion. This last rule regarding daughters, though not given explicity for undivided coparceners by the Hindu lawyers, may be deduced from the injunction given to reunited coparceners at May. Chapt. IV. Sec. IX. para. 22, and from that given to the relations of persons disabled from inheriting, to maintain and to marry the daughters of such persons (Mit. Chapt. II. Sec. X. para. 12).

The rule, that all widows of predeceased coparceners though not entitled to a share on partition, have a claim to maintenance as against the estate, which is supported by the analogy of the rules regarding wives of persons disqualified from inheriting, has been laid down by Sir R. Couch, C.J., S. A. No. 61 of 1867, Bombay H. C. R. IV., A. C. J. 73 ; and in S. A. No. 311 of 1868 it was determined, that the award or not of a separate maintenance rests in the discretion of the Court. So

* May. Chapt. IV. Sec. VIII. para. 6, and Chapt. IV. Sec. IX. para. 22; Mit. Chapt. II. Sec. I. paras. 7 and 20; N. W. P. Sel. Ca. III. 452.

also at Calcutta in a case at C. W. R. VI. C. R. 37; and N. W. P. R. for 1859 p. 57. In a case under the Bengal law Sir B. Peacock, C. J., in a judgment, concurred in by Macpherson, J., says, that "a daughter-in-law has no legal right to a maintenance whether she live with her father-in-law or not." But all that was decided was that, "as long as she elects to live with her own father, she has no legal right to be maintained by her father-in-law." This doctrine was dissented from by Loch and Kemp, J.J., who upheld her legal right to maintenance, though she exercised the option of withdrawing to her father's house.* Sir B. Peacock's view may perhaps be defended under the Dáyabhága, which assigns no ownership to the son until the death of his father. But under the law of the Mitáksharà the son's position is essentially different, inasmuch as his joint right arises on his birth; and the widow's right to maintenance has always been recognized in this Presidency. See Bombay Sel. Ca. p. 138 (1*st Edn.*) The maintenance may be increased or diminished upon proper cause shown. See C. W. R. IX. C. R. 152.

LIABILITIES. *Provisions for relations &c.*

§ 7. The rights and duties of the coparceners towards each other, arising upon partition relate to—

Rights and duties arising on partition.

I. The determination of the shares to which the sharers are severally entitled.

II. The distribution of the common liabilities.

1. Of debts.

2. Of other liabilities.

I. With respect to the determination of the shares for actual enjoyment; this has regard only

* C. W. R. IX. C. R. 413.

Rights and duties arising on partition.

to the property as it actually subsists without allowances for previous inequalities of expenditure (Coleb. Dig. Bk. V. Ch. VI. T. 377; C. W. R. IX. C. R. 483).* It is regulated by the nature of the property, as (1) divisible or (2) naturally indivisible.

In the former case the partition proceeds regularly by a distribution in specie of portions amongst the sharers.

The amount of the portions varies according to the status of the sharer in the family, and, in some cases, according to the nature of the property.

We have to distinguish—

(*a*) The partition between an ancestor and his first three descendants.

α Of ancestral property,

β Of self-acquired property.

(*b*) The partition between brothers and collaterals, undivided.

(*c*) Between coparceners reunited.

Partition between ancestor and first three descendants.

I. 1. *a*. α. On a partition between an ancestor and his first three descendants of ancestral property, the shares are equal.†

On a partition of self-acquired property made spontaneously by the head of the family he may reserve for himself a double share.‡ But not, if the partition be enforced by the descendants. This follows from the text which states, that, 'if the

---

* Where however what is said as to a manager's accountability to a minor coparcener is opposed to Coleb. Dig. Bk. V. T. 136. See also the case of Appuviar *vs*. Rama Subayana and others. Sutherland's P. C. J. 657.

† Mit. Chapt. I. Sec. V. para. 8.

‡ Mit. Chapt. I. Sec. V. para. 7; May. Chapt. IV. Sec. IV. para. 12.

Partition between ancestor and first three descendants.

father makes a partition *by his own* desire, he receives a double share, and is also particularly stated in the Víramitrodaya.' The descendants take equal shares *per stirpes*; unequal partition by deduction formerly recognised is not admitted in the present (Kali) age.*

As the Hindu Law, however, admits the father's right of disposal over self-acquired moveables, there would be no objection to his making an unequal distribution of this portion of his property amongst his sons.† The Bombay H. C. has ruled (B. H. C. R. II. 318) that "a father united with his son has full power to alienate self-acquired land," which implies a complete power of disposal. See also C. W. R. VI. C. R. 71; X. C. R. 287; N. W. P. R. for 1859, p. 63; and below II. Dig. Chapt. I. Sec. II. Q. 8 Rem., and Sec. III. Q. 1. Rem. According to this principle, the head of a family would be equally unfettered in the distribution of his immoveable as of his moveable self-acquired property; but see Strange H. L. I. 20, 21; II. 9, 11, 13, 439.

An adopted son receives a fourth part of a share, if legitimate sons of the body have been born after his adoption.‡

The illegitimate son of a S'údra may also receive a share.§

On a partition, being made by a father, head of a family, his wives receive a son's share;|| in case

* Mit. Chapt. I. Sec. III. para. 4; May. l. c. para. 11.

† Mit. Chapt. I. Sec. I. para. 27; May. Chapt. IV. Sec. I. para. 5.

‡ Mit. Chapt. I. Sec. XI. para. 24; May. Chapt. IV. Sec. V. para. 17.

§ Mit. Chapt. I. Sect. XII. paras. 1 and 2; May. Chapt. IV. Sec. IV. para. 32.

|| Mit. Chapt. I. Sec. II. paras. 8 and 9; May. Chapt. IV. Sec. IV. para. 15.

they had received no Strídhana. If they had received Strídhana, they obtain half a share, *i.e.*, so much as, together with their Strídhana, will make up a son's share.

Partition between brothers or collaterals.

I. 1. *b.* On a partition between brothers the shares are distributed equally; on partition amongst collaterals, *per stirpes.** As to the extent of the property, thus subject to equal partition, see above, *Property to be divided.*

If previously to the separation a particular member had had sole possession with the assent of his coparceners of some portion of the estate, he may retain that portion. C. W. R. V. C. R. 208; and where a member had built a house out of his separate funds on a piece of the ancestral land it was held that this did not become part of the family property subject to partition. All that the coparceners can claim in such a case is a proportionate addition to their shares by way of compensation for the land withdrawn from the general partition.

Rights and duties arising on partition.

The rule regarding adopted sons given above holds good here also. The illegitimate son of a S'údra is entitled to half a share. Regarding the interpretation of the term 'half a share' see I. Dig. Introd. p. xliii. On partition amongst brethren, mothers, stepmothers, paternal grandmothers, and stepgrandmothers receive a son's or grandson's share, provided they have obtained no Strídhana. If they have obtained Strídhana, they are then entitled to so much only, as with the Strídhana will make up their proper portion.†

* Mit. Chapt. I. Sec. III. para. 1; Chapt. I. Sec. V. para. 1.

† Mit. Chapt. I. Sec. VII. para. 1 sqq.; May. Chapt. IV. Sec. IV. paras. 18 and 19.

On partition between brothers unmarried sisters receive a quarter of a son's share.*

Partition between reunited coparceners.

§ 7. I. 1. *c.* In the case of a partition between reunited coparceners, the shares are equal, notwithstanding that the portions brought in on reunion were unequal.†

Regarding the descent of shares in a reunited family see I. Dig. Introd. lx. sqq.

Partition of naturally indivisible property.

§ 7. I. 2. Naturally indivisible property must be disposed of so that the coparceners severally may derive from it the maximum of advantage; a principle, readily deducible from the text of Bṛihaspati, May. Chap. IV. Sec. VII. para. 22.

Thus roads or ways, wells, tanks and pasture-grounds ought to be used by all the coparceners; the proceeds of an hereditary office are to be divided, or it may be enjoyed in turns. Places of worship and sacrifice not being divisible, the coparceners after separation are entitled to their turns of worship: C. W. R. VIII. C. R. 193. Where such a mode of enjoyment is impracticable or inconvenient, the property may be sold, and its proceeds divided, or the rights of the coparceners otherwise equitably adjusted by agreement.

Clothes in use, vehicles, ornaments, furniture books and tools are to be kept by the coparceners who use them. But see also above § 5 B *ad fin.*

A division of rents and other profits of land or houses, called Phalavibhága, is permissible, and constitutes a valid partition, though distinguished from the ordinary distribution in specie.

* Mit. Chapt. I. Sec. VII. p. 5—14; Mayûkha Chapt. IV. Sec. IV. paras. 39 and 40.

† May. Chapt. IV. Sec. IX. para. 2.

Partition of naturally indivisible property. The rule extends to the division of the profits of a Watandárí village (II. Borr. 730, *Ed. of* 1863). But such a distribution cannot be taken as conclusive of partition. See above p. xv. With the recent case there quoted, however, compare also I. B. H. C. R. 43.

LIABILITIES. § 7. II. 1. The common debts are to be distributed in the same proportion as the shares of the common property.* From a passage in the Mayûkha l. c., para. 2, it might appear, that the discharge of the family debts is a necessary preliminary condition to a partition. But in other passages† a distribution of the debts amongst the coparceners is recognised, and the Dáyakramasangraha Chap. VII. para. 28 expressly declares that the debts may be discharged subsequently to partition.

If a distribution of the debts is made, the coparceners severally, who desire to secure themselves against further claims on the part of the creditors, should obtain the assent of the latter to that arrangement, see Sir T. Strange H. L. I. 191, and the authorities quoted there; and the case at C. W. R. X. C. R. 392. Without this the assets may be followed in their hands: see Coleb. Dig. Bk. I. Chap. V. T. 167, note; T. 169, and Jagannâtha's Commentary, though a separated son, it is said, is not answerable during the father's life for any debt contracted by his father: Coleb. Dig. loc. cit. and Bombay Sel. Ca. 249. In Sp. App. No. 3265 the Bombay Sudder Court ruled that the whole of the family property remains liable for a

* May. Chapt. IV. Sec. VI.

† May. Chapt. IV. Sec. IV. para. 17; Mit. Chapt. I. Sec. III. para. 1; Colebrooke Dig. Bk. I. Chapt. V. Text 149; Bk. V. Chapt. III. Text 111, and Jagannâtha's Com. Chapt. VI. Text 375.

debt (properly) contracted by any member although another may have obtained a decree for a partition.

LIABILITIES.

2. Other liabilities, that is provisions for the maintenance or portions of persons not entitled to shares, may be distributed by agreement amongst the cosharers. But the estate at large is liable,* and coparceners who desire to limit their responsibility must obtain the assent of the persons interested. At Calcutta it has been held † that the purchaser of part of an estate subject to a charge, may be sued singly for the whole amount due, and the same principle would probably be applied to a charge of the kind we are now considering.

3. Lastly, if contrary to the knowledge and expectation of the coparceners who made the partition an absent coparcener supposed to be dead should come forward to claim his share or the widow of one deceased should give birth to a son, the proper share of this additional parcener must be made by proportionate deductions from the shares distributed.‡

---

* Bombay H. C. R. IV. A. C. J. 73.

† C. W. R. VI. C. R. 253.

‡ Mit. Chapt. I. Sec. VI. paras. 1, 8; May. Chapt. IV. Sec. IV. para. 35; Coleb. Dig. Bk. V. Chapt. VII. Sec. II. T. 394.

HINDU LAW.

BOOK II.

BOOK THE SECOND.

PARTITION.

CHAPTER I.

BETWEEN THE HEAD OF A FAMILY AND HIS FIRST THREE DESCENDANTS.

SECTION 1.—OF ANCESTRAL PROPERTY.

Question 1.—Can a son claim a share of the ancestral and undivided property from his father ?

Answer.—A son has no right to demand a share of the ancestral and undivided property from his father against his wish, unless there are good reasons for the demand.

These reasons may be stated thus :—

1. The father has relinquished his claim to his property.
2. He is dissipating his property.
3. He is in a state of unsound mind.
4. He is very old.
5. He is afflicted with an incurable disease.

In all these cases a son can claim a share of the ancestral property from his father, though he may be unwilling to give it.

Surat, 3rd January 1859.†

---

† Authority.

Vyav. May. Dáyabhága, *p.* 91, *l.* 7.

REMARKS.

1. The passage quoted by the Shastri, as well as the rules derived therefrom, refer to the self-acquired property of the father. Regarding the fourth ground for which the son is said to be able to demand division—old age—it ought to be remarked that it holds good only, if the father is unable to manage his affairs on account of old age.

2. According to the Mitákshará, *l. c.*, and *ibidem* paras. 5 and 8, the son has a right to demand the division of ancestral property. Nílakaṇṭha states the same. (Borradaile, May. Chapter IV. Sec. IV. para. 13.)

AUTHORITY.

* Mit. Vyav. *f.* 50, *p.* 1, *l.* 7.

भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा ।
तत्र स्यात्सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि

"For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels" (which belonged to him). (Mit. Chapter I. Sec. V. para. 3; Bombay Selected Cases, p. 44, 45.

QUESTION 2.—A man has a right to one-third of the property left by his deceased father; the man has two sons. The question is, how the man's share should be divided among the grandsons?

ANSWER.—The sons and the grandsons of the deceased have equal right to the share of the grandfather's property, but as the father of the two grandsons is alive and is in a good state of health, the share cannot be divided unless the father has no objection thereto. The Shastra assigns many conditions to the subdivision of such share, and it is, therefore, impossible to say what shall be the share of each grandson in the share of the son.†

Surat, 18th March 1858.

---

† AUTHORITY.

V. Dáyabhága, *f.* 47, *p.* 1, *l.* 7.

Similar answers were received from other zillahs under the following dates :—

Ahmednuggur, 21st February 1851.

Broach, 22nd May 1857.

AUTHORITY.

* Mit. Vyav. *f.* 50, *p.* 1, *l.* 7.
See the preceding Question.

REMARKS.

1. The sons can enforce the partition of the ancestral property, and it must be divided equally between the father and his sons.

2. The Shastri thinks of the partition of property acquired by the father himself or of the grandfather's property during his life and that of the father.

QUESTION 3.—Can sons of a man divide the ancestral property among themselves without his consent?

ANSWER.—A man's sons have a right to the ancestral property, but if such property, after having passed from the family was regained by the father, it must be considered as his acquisition. This, as well as that property which may have been directly acquired by the father, cannot be divided without his consent.

Tanna, 2nd March 1854.†

AUTHORITY.

Mit. Vyav. *f.* 50, *p.* 1, *l.* 7.
See the preceding Question.

---

† AUTHORITIES.

Mit. Vya. *f.* 47, *p.* 1, *l.* 7.
Vyav. May. *p.* 91, *l.* 2.
l. 4.

Similar answers were received from other zillahs under the following dates :—

Surat, 27th May 1847.
Ahmednuggur, 18th July 1850.
Poona, 18th October 1854.
Dharwar, 25th October 1858.

REMARKS.

The sons have a right to demand from their father the division of the ancestral property, and can force him by law to make it. But they cannot divide it privately amongst themselves without reference to their father.

As to the meaning of "recovered" when applied to a family estate, see C. W. R. IX. C. R. 69, and Introd. § 5 A. I, 2.

QUESTION 4.—A Yogi had four sons. Two of these, one a minor and another of full age, lived with their father. The other two, who had a quarrel with their father, divided the house, which was the ancestral property of the family, against the will of the father and in his absence. Can the two sons divide the property, or must such a division be cancelled?

ANSWER.—The division must be cancelled.

Khandeish, 11*th October* 1852.†

REMARKS.

1. The Shastri's answer is right, because the division had been made, as it would seem, without due regard to the equal rights of the other brothers. But it must be understood, that, though this division must be cancelled, the sons may force their father to make a division of his ancestral property.

2. The authority quoted by the Shastri, which declares that "brothers shall divide the estate after their father's death" (Borradaile, May. Chapter IV. Sec. IV. para. 1) refers to self-acquired property, and is, therefore, out of place.

QUESTION 5.—A man has instituted a suit against his father for a moiety of the ancestral property as his share. The father has answered that he has contracted some debts on account of the maintenance of the family, and

† AUTHORITY.

Vyav. May. *p.* 90, *l.* 2.

that his son cannot claim a share of the property until the debts have been paid. The question, therefore, is whether a son can claim a share of the property without paying the debts?

Answer.—The obligation of liquidating the debts rests on the father. His son is not at all responsible for them as long as the father is alive. The father and the son have an equal share in the ancestral property of the family. The son, therefore, can claim a moiety of the property without being obliged to pay the debts.†

Surat, 6th July 1860.

AUTHORITIES.

1. Mit. Vyav. *f.* 50, *p.* 1, *l.* 7.
   See Chapter I. Sec. I. Q. 1.
2. Mit. Vyav. *f.* 46, *p.* 2, *l.* 11.

एकोऽपि स्थावरे कुर्याद्दानाधमनविक्रयम्।
आपत्काले कुटुम्बार्थे धर्मार्थे च विशेषत इति ॥

अस्यार्थः। अप्राप्तव्यवहारेषु पुत्रेषु पौत्रेषु चानुज्ञानादावसमर्थेषु भ्रातृषु वा तथाविधेष्वविभक्तेष्वपि सर्वकुटुम्बव्यापिन्यामापदि तत्पोषणे चावश्यं कर्तव्येषु च पितृश्राद्धादिषु स्थावरस्य दानाधमनविक्रयमेकोऽपि समर्थः कुर्यादिति ॥

"Even a single individual may conclude a donation, mortgage, or sale of immoveable property, during a season of distress, for the sake of the family, and especially for a pious purpose."

The meaning of that is this: while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like: or while brothers are so and continue unseparated; even

† Mit. Vyav. *f.* 19, *p.* 2, *l.* 8.

one person, who is capable, may conclude a gift, hypothecation, or sale of immoveable property, if a calamity affecting the whole family require it, or the support of the family render it necessary; or indispensable duties, such as the obsequies of the father or the like, make it unavoidable. (Colebrooke, Mit. Chapter I. Sec. I. paras. 28 and 29.)

REMARK.

The son is not directly responsible for unsecured debts contracted even for the benefit of the family by his father during the life of the latter (see Bombay Sel. Cases, p. 221). As to secured debts thus contracted during his minority, or, with his acquiescence, after his attaining his majority, the case is different. See the passage cited, and II. B. H. C. R. 318. Nor does it follow that because he is not directly liable to creditors for the family debts he is not liable for contribution to his father, when his father has had to pay them. A discharge or distribution of the debts by ordinary co-parceners making a partition being expressly enjoined, it might seem to follow, *à fortiori*, that a son taking his share of the family estate from his father should take also, if his father desire it, his proportion of the burdens; but this is not prescribed by the law books. After the father's death the son is by Hindu Law responsible for all his debts except those contracted for immoral purposes, and this liability, as under the Roman Law, is independent of inherited assets (see B. H. C. R. II. 64); but this has been limited by Bombay Act VII. § 4 of 1866, to the amount of the family property taken by the son. In Bengal it has been held (I. C. W. R. 96) that the Mit. Chap. I. § VI. para. 10 authorizes the alienation by a father for the payment of joint debts even *against* the will of his son; so that the father could protect himself in that way. As to unsecured creditors, what is said in Mr. Grady's work (H. L. p. 325), "The co-sharers amongst whom (the family property) could be divided would (therefore) be liable to the creditors to the extent of their respective shares at least," applies only to partitions amongst brothers or collaterals. The separated son is not legally liable to the creditors either during his father's life or after it, unless he choose to accept the property left by his father, according to the cases at II. Strange 274, 277; but with these compare the dicta of the Shastris in the case above-quoted from Bombay Sel. Cases, which correctly express the doctrine formerly prevailing at this side of India, making the son's obligation a legal and not merely a moral one.

Question 6.—A person has six sons, the eldest of whom is dead. The son of the deceased sues his grandfather for a share of the family property. Is the claim admissible?

Answer.—The grandson cannot claim any share of the property which his grandfather may have himself acquired. He may, however, claim a share of that which may have descended from his ancestors.†

Dharwar, 1846.

Day and month are not mentioned. Authority not quoted.

AUTHORITY.

* Mit. Vyav. *f.* 50, *p.* 1, *l.* 7.

See Chapter I. Sec. I. Q. 1.

REMARKS.

1. The authority quoted refers only to the case of a father and a son.

2. The question whether a grandson can force his grandfather to make a division of the property which he inherited from his ancestors has not been touched directly in the Hindu Law-books. Still the correctness of the Shastri's opinion may be shown by the following considerations. The position of a son's son towards his grandfather, and his rights to the ancestral property are exactly the same as those of a son. Both have by and from their birth an ownership in the family property, a right which is indefeasible and unobstructible (see Mit. Chapter I. Sec. I. para. 3, and I. Dig. p. xli). Moreover, on the death of his father, the grandson takes his place in regard to religious ceremonies, and represents him, it is only consistent therefore that the grandson's right to demand a division of his grandfather's ancestral property should be the same as that of his father. See also Introd. § 4. I. Remark 2; and I. M. H. C. R. 77.

† A similar answer was received from another zillah under the following date:—

Surat, 19th September 1846.

Authority not quoted.

Question 7.—A man has two sons. He equally divided his property between them. He gave one share to his eldest son and the other to his grandson, because his younger son was abroad. The question for consideration in the case is, whether a father can, without the consent of his son, give his share to his grandson?

Answer.—The father could not give his son's share to his grandson, unless his son is incompetent to receive it.†

Ahmednuggur, 12*th September* 1855.

AUTHORITY.

* Víramitrodaya, *f.* 181, *p.* 2, *l.* 16.

अत्र च पुत्रेच्छया यो जीवद्विभागो यश्चाजीवद्विभागः स एकेच्छ-यापि भवत्यविशेषात्। अत एव विभागं प्रक्रम्य यत्कात्यायनेनोक्तम्

अप्राप्तव्यवहाराणां धनं व्ययविवर्जितम्।
न्यस्येयुर्बन्धुमित्रेषु प्रोषितानां तथैव चेति॥

तदपि संमतम्। तदनुमतिमन्तरेण विभागाभावे तद्धनस्य बन्धु-मित्रेषु न्यासविधानमनुपपन्नं स्यात्॥

"Now both that partition which is made at the desire of sons during the lifetime (of their father), and that which is made after the father's death, are made even at the desire of one (coparcener). Therefore, that also, which has been stated by Kátyáyana in his chapter on Partition, 'They shall deposit the wealth of minors

---

† AUTHORITIES.

Mit. Vyav.	*f.* 47,	*p.* 1,	*l.* 7.
Mit. Vyav.	*f.* 60,	*p.* 1,	*l.* 13.
Mit. Vyav.	*f.* 60,	*p.* 2,	*l.* 8.
Mit. Vyav.	*f.* 46,	*p.* 2,	*l.* 14.
Mit. Vyav.	*f.* 50,	*p.* 1,	*l.* 7.
Mit. Vyav.	*f.* 12,	*p.* 1,	*l.* 16.
Vyav. May.		*p.* 161,	*l.* 8.
Vyav. May.		*p.* 94,	*l.* 1.
Vyav. May.			*l.* 3.

and absentees, preserving it from expense, with (their) relations and friends,' can take effect. For, if a partition could not take place without the permission of such (minors or absentees), the statement that their wealth shall be deposited with relations or friends, would be improper."

Remark.

According to the above passage it would appear that an absent son must not be simply passed over in favour of his son. But there would be no objection to deposit his share with the latter, in case the son's son is of age and fit to take care of it. See also Introd. § 4 I. Remark 4.

Question 8.—A man gave a portion of the property belonging to his father to his son who had separated from him. It remained in the possession of his son for ten years. The son afterwards sold it. By this time his half brothers, born after the giving of the property, filed a suit and asserted that they had a right to a portion of the property given by their deceased father. The question is, whether or not sons born after their father had given away his property, can claim a portion of it even when it has been sold to another.

Answer.—When a father and his sons have divided their property and become separate, sons born after the partition can have no claim to the property which passed into the hands of their brothers. They cannot, therefore, sue those who have received a share of the property, nor those to whom it has been sold.

Tanna, 12*th July* 1851.

Authority.

Mit. Vyav. *f.* 50, *p.* 2, *l.* 7.

अनीशः पूर्वजः पित्रोर्भ्रातुर्भागे विभक्तजः ।

"A son born before partition has no claim on the wealth of his parents, nor one, begotten after it, on that of his brother." (Colebrooke, Mit. Chapter I. Sec. VI. para. 4.)

Remark.

Sons born after partition have, however, an exclusive right to their father's share, and to any property which he may have acquired after partition.

In Sp. Ap. No. 1641, S. A. R. for 1840, p. 16, the interest of a son still unborn was admitted as against a dissipation of property by the father; but in the case at IX. C. W. R. 337 it was held that a grandson unborn at the time cannot afterwards question an alienation of ancestral property made by his grandfather with his father's assent. It is only on the actual birth of the son that his co-ownership arises; it is not retrospective, as adoption to some extent is.

SECTION 2.—OF SELF-ACQUIRED PROPERTY.

Question 1.—Can a man and his son divide their property between them?

Answer.—The property left by the grandfather may be equally shared by the son as well as his father. The property acquired by the father should be divided into three shares, two of which should be allotted to the acquirer and one to his son.

Sholapoor, 29th January 1855.†

Authorities.

* 1. Mit. Vyav. *f.* 50, *p.* 1, *l.* 7.
See Chapter I. Sec. 1, Q. 1.
* 2. Mit. Vyav. *f.* 50, *p.* 1, *l.* 11.

तथा द्वावंशौ प्रतिपद्येत विभजन्नात्मनः पितेत्येतदपि स्वार्जितविषयम् ॥

---

† Viramit. *f.* 105, *p.* 2, *l.* 3.
Vyav. May. *p.* 183, *l.* 6.
p. 174, *l.* 3.
p. 180, *l.* 3,
l. 4.

So does that which ordains a double share (relate to property acquired by the father himself). "Let the father making partition reserve two shares for himself." (Colebrooke, Mit. Chapter I. Sec. V. para. 7. Colebrooke, Dig. Bk. V. S. 96. But see also paras. 9, 10.)

QUESTION 2.—A man has four or five sons, and it is probable that he may have more. For some reason known only to the man, he framed a memorandum, showing what each of his sons was to receive, on account of his share. Can this memorandum be taken advantage of by the sons in claiming a share during the lifetime of the father?

ANSWER.—A father may give shares to his sons if he chooses, but sons have no right to demand shares of any property acquired by their father while he is alive. The memorandum does not seem to be authoritative, and cannot be taken advantage of by the sons.

Dharwar, 11*th January* 1850.

AUTHORITY.

Mit. Vyav. *f*. 47, *p*. 1, *l*. 12.

विभागं चेत्पिता कुर्यादिति यदा पितुर्विभागेच्छा स तावदेकः कालः। अपरोपि जीवत्येव पितरि द्रव्यनिःस्पृहे निवृत्तरमणे मातरि च निवृत्त-रजस्कायां पितुरनिच्छायामपि पुत्रेच्छयैव विभागो भवति। यथोक्तं नारदेन। अत उर्ध्वं पितुः पुत्रा विभजेयुर्धनं सममिति पित्रोरूर्ध्वं विभागं प्रतिपाद्य

मातुर्निवृत्ते रजसि प्रत्तासु भगिनीषु च।
निवृत्ते चापि रमणे पितर्युपरतस्पृहे इति

दर्शितम्। अत्र पुत्रा धनं समं विभजेयुरित्यनुषज्यते। गौतमेनापि ऊर्ध्वं पितुः पुत्रा रिक्थं विभजेरन्नित्युक्त्वा निवृत्ते चापि रजसीति द्वितीयः कालो दर्शितः। जीवति चेच्छतीति तृतीयः कालो दर्शितः। तथा सरजस्कायामपि मातर्यनिच्छत्यपि पितर्यधर्मवर्तिनि दीर्घ-रोगग्रस्ते च पुत्राणामिच्छया भवति विभागः। यथाह शङ्खः।

अकामे पितरि रिक्थविभागो वृद्धे विपरीतचेतसि रोगिणि चेति

One period of partition is, when the father desires separation as expressed in the text [para. 1], "When the father makes a partition." Another period is while the father lives, but is indifferent to wealth, and disinclined to pleasure, and the mother is incapable of bearing more sons; at which time a partition is admissible, at the option of the sons, against the father's wish; as is shown by Nárada, who premises partition subsequent to the demise of both parents, "Let sons regularly divide the wealth when the father is dead," and adds, "or when the mother is past child-bearing, and the sisters are married, or when the father's sensual passions are extinguished." Here the words "let sons regularly divide the wealth" are understood. Gautama likewise having said "after the demise of the father, let sons share his estates," states a second period, "Or when the mother is past child-bearing;" and a third, "While the father lives, if he desire separation." So, while the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father be unwilling, if he be addicted to vice or afflicted with a lasting disease. That S'ankha declares, "Partition of inheritance takes place without the father's wish, if he be old, disturbed in intellect, or diseased." (Colebrooke, Mit. Chapter I. Sec. II. para. 7.)

REMARK.

Section V. para. 8 assigns to the sons power to demand a partition of ancestral property at any time, while para. 10 gives to the father full power of disposition over property acquired by himself. At Madras it has been said (I. M. H. C. R. 77) that paras. 8 and 11 relate to a partition of ancestral property, while Sec. II. relates to property acquired by the father himself. Thus the power of disposition generally affirmed in paragraph 10 of Sec. V. does not imply that of a capriciously unequal distribution, that case being expressly provided against in Sec. II. para. 13. See also under Q. 5. The passage in Sec. V. para. 10 is further qualified by Sec. I. para. 27.

QUESTION 3.—A man has a son by each of his two wives. Should any larger share be given to the son of the elder wife?

ANSWER.—No.

Dharwar, 1846.

Date and month not mentioned. Authority not quoted.

AUTHORITY.

* Mit. Vyav. *f.* 48, *p.* 1, *l.* 8.

उक्तं च । यथा नियोगधर्मो नो नानूबन्ध्यावधोपि वा ।
तथोद्धारविभागोपि नैव संप्रति वर्तत इति ॥

(5.) It is expressly declared, "As the duty of an appointment (to raise up seed to another), and as the slaying of a cow for a victim, are disused, so is partition with deductions (in favour of elder brothers)."—(Colebrooke, Mit. Chapter I. Sec. III. para. 5.)

REMARK.

The "partition with deductions" (uddhára) includes the division between elder and younger sons, and between the sons of elder and younger wives. Regarding the latter see Gautama adhyáya, 28, 11, 12; I. Dig. p. 322.

QUESTION 4.—There are two uterine brothers whose father is alive. When they divided their property, one of them obtained a larger piece of ground. The other has sued him for it. The father wishes that the unequal division should remain as it is. Can the brother's claim to an equal division be allowed?

ANSWER.—In the Kali age, unequal division is forbidden. One brother can therefore sue the other. The father has no right to maintain an unequal division.

Ahmednuggur, 30*th July* 1848.†

AUTHORITIES.

* (1.) Mit. Vyav. *f.* 47, *p.* 1, *l.* 11.

अयं च विषमविभागः स्वार्जितद्रव्यविषयः । पितृक्रमायाते तु समस्वाम्यस्य वक्ष्यमाणत्वान्नेच्छया विषमो विभागो युक्तः ॥

---

† AUTHORITIES.

Mit. Vyav. *f.* 47, *p.* 1, *l.* 7.
f. 48, *p.* 1, *l.* 8.
f. 52, *p.* 1, *l.* 13.
f. 50, *p.* 1, *l.* 7.
f. 47, *p.* 2, *l.* 7.
f. 51, *p.* 1, *l.* 3.

This unequal distribution supposes property by himself acquired. But if the wealth descended to him from his father, an unequal partition at his pleasure is not proper; for equal ownership will be declared.—(Colebrooke, Mit. Chapter I. Sec. II. para 6).

* (2.) Mit. Vyav. *f.* 48, *p.* 2, *l.* 10.

ज्येष्ठं वा श्रेष्ठभागेनेति न्यूनाधिको विभागो दर्शितः। तत्र शास्त्रोक्तोद्धारादिविषमविभागव्यतिरेकेणान्यथा विषमविभागनिषेधार्थमाह।

न्यूनाधिकविभक्तानां धर्म्यः पितृकृतः स्मृतः॥

न्यूनाधिकविभागेन विभक्तानां पुत्राणामसौ न्यूनाधिकविभागो यदि धर्म्यः शास्त्रोक्तो भवति तदा पितृकृतः कृत एव न निवर्तेत इति मन्वादिभिः स्मृतः। अन्यथा तु पितृकृतोपि निवर्तेत इत्यभिप्रायः॥

13. The distribution of greater and less shares has been shown (§ 1). To forbid in such case, an unequal partition made in any other mode than that which renders the distribution uneven by means of "deduction," such as are directed by the law, the author adds: "A legal distribution, made by the father among sons separated with greater or less shares, is pronounced valid."

14. When the distribution of more or less among sons separated by an unequal partition is legal, or such as ordained by the law, then that division, made by the father, is completely made, and cannot afterwards be set aside: as is declared by Manu and the rest. Else it fails, though made by the father.—(Colebroke, Mit. Chapter I. Sec. II. paras. 13 and 14.)

* (3.) Mit. Vyav. *f.* 48, *p.* 1, *l.* 8.

See the preceding Question.

Remark.

Under the Hindu law the answer is correct, whether the land was ancestral (Auth. 1) or self-acquired property (Auth. 2 and 3.) The inequality of distribution contemplated by the latter is strictly limited to certain specified deductions that may be made in favour of the eldest son or the eldest wife's son. According to the principles laid down by the Courts, an unequal division of self-acquired property by a father is perhaps admissible, but it is opposed to the texts.

Question 5.—A man has two wives. Each of them has a son. The husband lived with the elder wife, and to her son he gave all his property in disregard of the claim of the younger wife's son. Has he a right by law to do so ?

Answer.—A father cannot give the whole of his property to one of his sons.

Dharwar, 15*th May* 1850.†

AUTHORITIES.

* 1—3. See the preceding two cases.
* 4. Víramitrodaya, *f.* 172, *p.* 2, *l.* 13.

जीवद्विभागे तु पिता नैकं पुत्रं विशेषयेत् ।
निर्भाजयेन्न चैवैकमकस्मात्कारणं विनेति ॥
कात्यायनवचसोऽपि निर्विषयता स्यादिच्छाया एव कारणत्वात् । न विशेषयेच्छास्त्रीयज्येष्ठभागाद्यतिरिक्तैच्छिकविशेषवन्तं न कुर्यात् ॥

"If (the father's) desire only were the reason for the allotment of the shares, then this passage of Kátyáyana, ' But at a partition, made during his life-time, a father shall not give an (undue) preference to one son, nor shall he disinherit a son without a sufficient reason,' would have no object. ' He shall not give preference' means ' he shall not give him, at his pleasure, a preference other than the share of the eldest and the rest, which have been declared in the law books.' "

Question 6.— A man has an odd number of sons and an even number of sons by his " Lagna" and "Páṭa wives respectively. How should his property be divided among them ? and have both the wives equal rights and position in the eye of the law ?

---

† AUTHORITY.

Mit. Vyav. *f.* 47, *p.* 1, *l.* 7.

Answer.—The property should be equally divided among the sons of the "Lagna" and "Páṭa" wives. Both the wives have equal rights and positions in the eye of the law.

The ceremonies of "Lagna" and "Páṭa" are however different.

Dharwar, 1858.† (Day and month not given).

Authorities.

1—4. See the three preceding cases.

Remark.

Regarding the position of Páṭa wives see remark to Digest I. Chapter II. Sec. 6a, Q. 37 (Vol. I. p. 90).

Question 7.—A shoemaker has four sons, three by his "Lagna" wife and one by his "Páṭa" wife. Two of the Lagna wife's sons are minors. The father has divided his property in the proportion of one half to the son of the "Páṭa" wife, and one half to the sons of the "Lagna" wife. Is this a legal division?

Answer.—It is ordained in the law that in the Kali age,‡ a father should divide his property, real and personal, equally among his sons. If any one should divide his property against this rule, it is not legal. A son has the right to prevent his father from making any irregular transfer of his ancestral property. When a man transfers his own property, it is necessary that his sons should acquiesce in the father's disposal of it. If a property has

---

† Authorities.

Mit. Vyav. *f.* 47, *p.* 2, *l.* 13.
f. 55, *p.* 2, *l.* 1.

‡ The Hindus divide their History into four ages; the present (Kali) is the last. Certain laws are said to have been practicable in the former ages, and not to be so now.

not been properly divided in the first instance it may be re-divided so as to allot proper shares to the sons.

Ahmednuggur, 18*th July* 1848.†

AUTHORITIES.

1. Mit. Vyav. *f.* 48, *p.* 1, *l.* 8.
   See Q. 3.
2. Mit. Vyav. *f.* 50, *p.* 1, *l.* 7.
   See Chapter I. Sect. I. Q. 1.
3, 4. See Q. 4 and 5.

QUESTION 8.—A Parades'î‡ has two sons, to the younger of whom he passed a deed of gift, stating that as his elder son did not support or obey him, he should not lay claim to the house purchased by him, which was granted to the younger, and that the elder son might build a house for his own use on the ground which had descended to him from his ancestors. The younger son was not, however, put in possession of the house, which was occupied by the elder son. The younger has therefore brought an action against him, and the question is whether the elder son can claim a moiety of the house?

ANSWER.—A special grant from a father to his son, as a mark of his affection for him, is legal. If the elder son is an ill-behaved man, he would forfeit his claim to the property of his father, and be entitled only to a maintenance. If the ground which is the ancestral property of

---

† AUTHORITIES.

Mit. Vyav. *f.* 47, *p.* 1, *l.* 7.
f. 52, *p.* 1, *l.* 13.
f. 47, *p.* 2, *l.* 7.
f. 51, *p.* 1, *l.* 3.
f. 47, *p.* 2, *l.* 10.
f. 9, *p.* 1, *l.* 9.
Vyav. May. *p.* 94, *l.* 1.
6.
3.

‡ The term means a foreigner, but is usually applied to a Hindu native of Northern Hindustán.

the family, was granted to the elder son with the consent of the younger, the grantee's title thereto must be admitted.

Ahmednuggur, 23rd September 1857.†

REMARK.

The father has, under the Hindu law, no right to dispose of immoveable property, though acquired by himself, without the consent of all his sons (Auth. below). If, therefore, the eldest son's misconduct was not such that he might be called pitṛidviṭ, "hater of his father" (for the definition of the meaning see I. Dig. Chapter VI. Sec. 3 *a*), and that he could be disinherited on this ground, he will share the father's property equally with his younger brother.

The Bombay High Court, however, allows the father to dispose, at his pleasure, of all self-acquired property, *II. B. H. C. R.* 318; and this may now be considered the settled doctrine of the Courts. See *C. W. R. VI. C. R.* 71.

AUTHORITY.

* Mit. Vyav. *f.* 46, *p.* 2, *l.* 9—

स्थावरे तु स्वार्जिते पित्रादिप्राप्ते च पुत्रादिपारतन्त्र्यमेव ॥
स्थावरं द्विपदं चैव यद्यपि स्वयमर्जितम् ।
असंभूय सुतान्सर्वान्न दानं न च विक्रयः ॥

But he is subject to the control of his sons and the rest, in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor: since it is ordained, "Though immoveables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons." (Colebrooke, Mit. Chapter I. Sec. I. para. 27.)

See also the authorities quoted under the preceding cases.

---

† AUTHORITIES.

Mit. Vyav.	*f.* 51, *p.* 1, *l.* 3.
Vîramitrodaya,	*f.* 50, *p.* 1, *l.* 7.
	p. 123, *l.* 8.
	f. 175, *p.* 2, *l.* 6.
Vyav. May.	*p.* 124, *l.* 1.
	p. 161, *l.* 8.

SECTION 3. MOTHER'S SHARE.

Question 1.—A man had two sons. He proposed that his property should be divided into three shares, two to be assigned to the sons, and one to himself. The division was carried into effect to a certain extent. The sons, however, disagreed and prevented the division from being fully enforced. Their mother held with the elder son, and the father with the younger. The elder son has sued the younger for one-half of the father's property. The father states that he is at liberty to dispose of his property in any manner he pleases. Is there any legal objection to the claim?

Answer.—The father divided his property into three shares, but it would have been more in accordance with the Shastra had he divided it into four shares, three to be assigned as above, and one to his wife. The original acquirer is, however, at liberty to dispose of his property in any way he likes. The elder son, therefore, has no right to sue the younger, for an equal share of the patrimony.

Ahmednuggur, 28*th April* 1847.†

AUTHORITIES.

1. Mit. Vyav. *f.* 47, *p.* 2, *l.* 3—

यदि कुर्यात्समानंशान्पत्न्यः कार्याः समांशिकाः ।
न दत्तं स्त्रीधनं यासां भर्त्रा वा श्वशुरेण वा ॥

If he make the allotments equal, his wives, to whom no separate property has been given, by the husband or father-in-law, must be rendered partakers of life-portions. (Colebrooke, Mit. Chapter I. Sec. II. para. 8.)

---

† AUTHORITIES.

Mit. Vyav. *f.* 47, *p.* 1, *l.* 7.
f. 69, *p.* 1, *l.* 1.
Mit. A'chára, *f.* 12, *p.* 1, *l.* 4.
f. 9, *p.* 2, *l.* 15.
Vyav. May. *p.* 85, *l.* 3.

* 2. Mit. Vyav. *f.* 48, *p.* 2, *l.* 10.

See II. Dig. Chapter I. Sec. 2, Q. 4.

3. Mit. Vyav. *f.* 50, *p.* 1, *l.* 11—

विभागं चेत्पिता कुर्यादित्येतत्स्वयमर्जितविषयम् ।
तथा द्वावंशौ प्रतिपद्येत विभजन्नात्मनः पितेत्येतदपि स्वार्जित-
विषयम् । जीवतोरस्वतन्त्रः स्याज्जरयापि समन्वित इत्येतत्पारतन्त्र्यं
मातापित्रर्जितविषयम् । तथानीशास्ते हि जीवतोरित्यतदपि ॥

The first text "When the father makes a partition, &c." (Sec. II. § 1) refers to property acquired by the father himself. So does that which ordains a double share: "Let the father, making a partition, reserve two shares for himself." The dependence of sons, as affirmed in the following passage, "While both parents live, the control remains, even though they have arrived at old age,"† must relate to effects acquired by the father and the mother. This other passage, "They have not power over it (the paternal estate), while their parents live," must also be referred to the same subject. (Colebrooke, Mit. Chapter I. Sec. V. para 7.)

Remark.

The mother is entitled to a share (Auth. 1), and a division made by the father, without taking into account her rights, is liable to readjustment (Auth. 2). See Introd. § 4. V. and below Chapter II. Sect 2. Q. 3. Under the Hindu law the father cannot directly divide his property in any way he likes. Considerable restrictions are placed on his power even as to self-acquired property by the Mit. Chapter I. Section II. See also Colebrooke, Dig. Bk. V. Chapter I. T. 27. The decisions of the English Courts, however, allow it as to self-acquired property, relying on a passage (Mit. I. V. 10) which the Shastri also in this answer appears to understand as conferring the power. The eldest son cannot enforce a partition of his father's self-acquired property (Auth. 3).

---

† This passage is not translated quite correctly. It ought to stand thus:—
"While both parents live, he (the son) is dependent, though he may have arrived at old age."

CHAPTER II.

PARTITION BETWEEN OTHER COPARCENERS.

SECTION 1. BETWEEN BROTHERS.

Question 1.—Would it be lawful for brothers to divide their property, when the son of a deceased brother is a minor?

Answer.—Yes.†

Tanna, 21st December 1858.

AUTHORITY.

Víramitrodaya, *f.* 181, *p.* 2, *l.* 16.

See II. Dig. Chapter. I. Sec. 1, Q. 7; II. Strange, H. L. 362.

REMARK.

In the absence of unfairness, infants are bound by a division in which they were represented by their mother as guardian. But a partition cannot ordinarily be demanded on their behalf. See B. H. C. R. IV. O. C. J. 159; II. Strange 310. See also Introd. § 4. II. Remark 3.

Question 2.—Of four brothers the existence of two cannot be ascertained. Can the remaining two divide their property equally between them?

Answer.—They cannot do so. The absent brothers will be entitled to their shares, whenever they may claim them.

Dharwar, 31st March 1857.‡

AUTHORITY.

Víramitrodaya, *f.* 181, *p.* 2, *l.* 16.

See II. Dig. Chapter I. Sect. 1, Q. 7.

REMARK.

The absence of the two brothers is no bar to the division of the estate. Their shares should, however, be set apart and kept intact. See also: II. Strange H. L. 396, 327; Colebrooke, Dig. Bk. V. T. 394; Vyav. May. Chap. IV. Sec. IV. para. 24; Introd. § 4. II. Remark 4.

---

† Víram. *f.* 170, *p.* 1, *l.* 1.
f. 182, *p.* 1, *l.* 1.
Mit. Vyav. *f.* 46, *p.* 2, *l.* 14.

‡ Mit. Vyav. *f.* 49, *p.* 1, *l.* 10.

Question 3.—There are three brothers. One of them is absent in a distant part of the country. The two are in possession of the property. One of them claims one half of it. Can he have so much? Can the fact of the absentee being a bachelor or married have any effect on the division?

Answer.—If a brother is not married, the expenses of his marriage should be defrayed from the common stock. The remainder will be divided; one brother has no right to demand one-half of the property, merely because another is absent.

Ahmednuggur, 25th July 1848.

AUTHORITY.

See the preceding case, and also the Remark on it.

Question 4.—A deceased man has left two sons, one of them has one son and the other has two. How should the property be divided among them?

Answer.—The father of the two sons should take one half of the property and equally divide it between his two sons. The father of the one should take the other half.

Dharwar, 8th January 1852.

AUTHORITIES.

* Mit. Vyav. *f.* 47, *p.* 2, *l.* 14—

विभजेरन्सुताः पित्रोरूर्ध्वमृक्थमृणं समम् ॥
पित्रोर्मातापित्रोरूर्ध्वं प्रयाणादिति कालो दर्शितः ।
सुता इति कर्तारो दर्शिताः । सममिति प्रकारनियमः ।
सममेवेत्यृक्थमृणं च विभजेरन् ॥

"Let sons divide equally both the effects and the debts, after [the demise of] their two parents."

2. [After their two parents]. After the demise of the father and mother: here the period of the distribution is shown.

[The sons.] The persons, who make the distribution, are thus indicated. [Equally]. A rule respecting the mode is declared: in equal shares only should they divide the effects and debts. (Colebrooke, Mit. Chapter I. Sect. III. paras. 1 and 2.)

REMARK.

If the sons of the second brother demand a division of their father's ancestral estate, his portion must be divided into three shares, one for the father and one for each son.

QUESTION 5.—A man was granted a piece of land as a charity. The grantee is now dead, and the land is in the possession of one of his sons. The other son has instituted a suit against his brother for the recovery of one-half of the land as his share of the property. The question is whether land granted as a charity is divisible?

ANSWER.—If the land was the property of the father and if it has not been alienated by him, his sons will be entitled to equal shares of the property.

Surat, 21*st August* 1845.

Authority not quoted.

AUTHORITY.

* Mit. Vyav. *l.* 47, *p.* 2, *l.* 14.
See the preceding Question.

REMARK.

The answer is right only under the supposition, that the land was not given for some particular purpose, *e. g.* the continual performance of an Agnihotra. If such a condition had been attached to the gift, the eldest son, who alone would be entitled to perform the ceremonies, would also alone inherit the land. This rule follows from the maxim, that, "whatever has been given for religious purposes must be used for the stated purposes only." (Borradaile, Vyav. May. Chapter IV. Sect. VII. para. 23.) Places of worship and sacrifice are not divisible. The parties are entitled only to their turns of worship. C. W. R. VIII. C. R. 193, and see also the case of Nobkissen Mitter *vs.* Hurrischunder Mitter, *Macn. Cons. H. L.* 323, cited Strange H. L. (4th Edn.) p. 360.

Question 6.—A man died, leaving two widows, who live separately. The one has one son and the other has two. How shall the property of the deceased be apportioned between the two widows on account of their respective sons.

Answer.—The property should be divided into as many equal shares as the number of the sons, and each mother should, in her capacity of guardian, take as many of them as the number of her sons.

Khandeish, 16*th December* 1858.†

AUTHORITY.

* Vyav. May. *p*. 97, *l*. 7—

एतत्प्रत्युदाहरणमाह बृहस्पतिः ।
सवर्णा भिन्नसंख्या ये पुंभागस्तेषु शस्यते ॥

Bṛihaspati gives this opposite example, "Among brothers, who are equal in class, but vary in regard to the number [of sons produced by each mother], the shares of the heritage are allotted to the males, [not to their mothers.] (Borradaile, Mayúkha, Chapter IV. Sec. IV. para. 26.)

REMARK.

Widows have no right to their husband's estate during the life-time of their sons, and it is, therefore, impossible, that the partition should be made through them. But, if a man leave several wives, who have an equal number of sons who are minors, circumstances may arise, which make a division into two shares more advantageous, than one into many, and in that case the Hindu law is not opposed to a "division according to mothers." This appears to be the sense, in which Nílakaṇṭha took the passage of Bṛihaspati and Vyása, quoted by him, May. Chapter IV. Sect. IV. para. 25. See also Colebrooke, Dig. Bk. V., T. 62, 63. In any other sense Patníbhága would probably not be recognized. See Strange H. L. (4th Ed.) p. 359.

The widows are, however, entitled to a share each. A claim for partition must on this account be scrutinized, not granted as of course, while the children are minors.

---

† AUTHORITY.

Víram. *f*. 182, *p*. 1, *l*. 1.

Question 7.—A person of the goldsmith caste had two wives, one of whom has three sons and the other one. How should the ancestral property be divided among them?

Answer.—A larger share being allotted to the eldest, the rest should be equally divided among the other three.

Sholapore, 17th January 1846.

Authorities not quoted.

AUTHORITIES.

* 1. Vyav. May. *p.* 97, *l.* 7.
See the preceding question.

* 2. Mit. Vyav. *f.* 48, *p.* 1, *l.* 8.
See II. Dig. Chapter I. Sec. 2, Q. 3.

* 3. Mit. Vyav. *f.* 47, *p.* 2, *l.* 14.
See II. Dig. Chapter II. Sec. 1, Q. 4.

REMARK.

1. The eldest does not receive any larger share than the others. (Authority 2.)

2. The estate must be divided into six equal shares, as the mothers receive shares as well as the sons. (Authority 3.)

Question 8.—There are three brothers, of whom one is unmarried. A house belonging to their father is to be divided among them. The question is, whether it should be equally divided among the three, or whether the whole or a large part of it should be given to the unmarried brother? Another question in connection with this case is whether an elder son can mortgage his house during the lifetime of his mother?

Answer.—If a brother is unmarried a sum sufficient to defray the expenses of his marriage should be first set aside from the common property, and then the rest equally divided among them. If the property is just sufficient for the expenses of the marriage, the whole may be set aside

for the purpose. The house cannot be mortgaged without the consent of all the brothers having a share in it. The consent of the mother is not required. If, however, some of the brothers are absent, and the money is required for the urgent necessity of the family, one of them can mortgage the house.

Poona, 10*th August* 1851. †

AUTHORITIES.

* 1. Mit. Vyav. *f.* 51, *p.* 1, *l.* 7.
See II. Dig. Chapter II. Sec. 2, Q. 1.
2. Mit. Vyâv. *f.* 46, *p.* 2, *l.* 11—

पितरि प्रेते यद्यसंस्कृता भ्रातरः सन्ति तत्संस्कारे कोधिक्रियत इति । अत आह ।

असंस्कृतास्तु संस्कार्या भ्रातृभिः पूर्वसंस्कृतैः ।

पितुरूर्ध्वं विभजद्भिर्भ्रातृभिरसंस्कृता भ्रातरः समुदायद्रव्येण संस्कर्तव्याः ॥

(3.) If any of the brethren be uninitiated when the father dies, who is competent to complete their initiation? The author replies: "Uninitiated brothers should be initiated by those for whom the ceremonies have been already completed."

(4.) By the brethren, who make a partition after the decease of their father, the uninitiated brothers should be initiated at the charge of the whole estate. (Colebrooke, Mit. Chapter I. Sec. VII. paras. 3 and 4.)

REMARK.

Compare also the rules of Nárada Dáyavibhága, vs. 33 and 34, I. Dig. Appendix, *p.* 356.

QUESTION 9.—(1.) Three daughters of one and one of another brother were married when the family was undivided. Afterwards when they separated, the brother whose one daughter only was married objected to his brother's

† AUTHORITIES.

Mit. Vyav. *f.* 69, *p.* 1, *l.* 8.
f. 47, *p.* 2, *l.* 10.
f. 46, *p.* 2, *l.* 11.

taking an equal share of the family property on the ground of a large expense having been thrown upon the resources of the family by the marriages of his three daughters. Is this a proper objection? Should the brother whose three daughters were married have a smaller share of the property?

(2.) Suppose the case stands as follows:—

Three daughters of one brother were married. After this, the other brother became separate and got his daughter married. When the brothers subsequently came to actually divide the property, the father of one daughter proposed that the expense which he had incurred on account of the marriage of his daughter should be paid to him from the property, and that it should then be equally divided between them. Is this a just proposal?

Answer.—(1.) The brother whose three daughters were married during the union of the family, is entitled to a half of his father's property.

(2.) In the other case, the proposal made by the father of one daughter is proper.

Suddur Adawlut, 22*nd June* 1825.

Authorities not quoted.

Remarks.

1. The correctness of para. 1 of the Shastri's answer follows from the fact, that the duty of marrying a girl lies with her father.

2. The second part of the answer is based on the maxim that all expenses of united brothers must be defrayed out of the family estate. For the two brothers, though one 'became separate,' still were members of a united family, because a partition of the estate had not taken place. See Colebrooke, Dig. Bk. V., T. 136, 373, and Jagannátha's Commentary. II. Strange, H. L. 394.

Question 10.—A lunatic has a son and a wife. Can his brother, who is not separated from him, claim the share of a certain property to which the lunatic is entitled?

Answer.—A man who is blind, lame, mad, &c. forfeits his right to a share of the family property, but a son of such a person, if not labouring under a similar disqualification, can claim the share due to his father.

Tanna, 24th February 1853.†

AUTHORITY.

Mit. *f.* 60, *p.* 2, *l.* 8—

औरसाः क्षेत्रजास्तेषां निर्दोषा भागहारिणः।

But their (the lame, blind, &c. man's) sons, whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects. (Colebrooke, Mit. Chapter II. Sect. X. para. 9.)

REMARK.

In a case at C. W. R. VII. C. R. 5 it is said that an idiot, though excluded from inheritance may take by conveyance. The source of the disabled member's title therefore is of importance.

Question 11.—Is an elder brother entitled to the right side of a house whether it be of a more or less value, or should he receive a share which is equal in point of value on whatever side it might be?

Answer.—It is a custom to assign the right side of a house to the elder brother. It will rest with the Court to decide how far the custom should be respected.

Ahmednuggur, 29th July 1848.‡

Question 12.—A deceased man has left two sons. They are engaged in a dispute regarding the division of a

---

† AUTHORITY.

Mit. Vyav. *f.* 60, *p.* 1, *l.* 13.

‡ Similar answers were received from the other zillahs under the following dates:—

Rutnagherry, 17th December 1859.
Poona, 15th December 1859.
Tanna, 9th March 1860.

house. Their father has not left any writing as to the side of the house on which each of his sons should take his share of it. The question is whether the share of the elder son should be on the right side of the house?

Answer.—The usage allows the elder son to have his share on the right side, but in the book called "S'ánti-ratnákara," it is stated that the elder brother should have his residence on the western side of a house. The western part of the house therefore should be assigned to the elder brother.

Poona, 22nd August 1853.

Question 13.—There are four shares in a house, three belong to the sons and the fourth to their mother. On what side of the house should the second son have his share.

Answer.—There are no provisions in the Shastras on the subject.

Rutnagherry, 23rd November 1846.

SECTION 2.—MOTHER AND SON.

Question 1.—If a mother and her son do not wish to live together as an undivided family, can the mother claim a share?

Answer.—If the property is ancestral or acquired conjointly by the mother and her son, it should be equally divided between them. The mother should support herself from the proceeds of her share, but cannot dispose of it by gift or sale. On her death her son will inherit it.

Rutnagherry, 27th October 1851.

AUTHORITY.

Mit. Vyav. *l.* 51, *p.* 1, *l.* 7—

पितुरूर्ध्वं विभजतां माताप्यंशं समं हरेत् ॥

"Of heirs dividing after the death of the father, let the mother also take an equal share." (Colebrooke, Mit. Chapter I. Sect. VII. para. 1.)

REMARK.

The text shows only *the right of the mother to a share,* in case a partition is made, but not her right to *demand a partition.* The latter right does not exist, and it would therefore seem that in the case in question, where there is only one son, she cannot ask for a division. See also Introd. § 3 I. Remark 2; and § 4 II. Remark 5.

As to the nature of the mother's estate in the portion allotted to her, see Strange H. L. II. 383, where Colebrooke shows that according to the Mitákshará there is an absolute assignment of a share, not a mere setting apart of a maintenance, though maintenance be the object of the assignment.

QUESTION 2.—Can a son and his mother divide the family property between themselves ?

ANSWER.—The Shastra declares that if sons, after the death of their father, should divide their property, a share of it, equal to that which is taken by each of the sons, should be allotted to their mother.

Ahmednuggur, 29th November 1855.†

AUTHORITY.

Mit. Vyav. *f.* 51, *p.* 1, *l.* 7.
See the preceding question.

---

† AUTHORITIES.

Mit. Vyav. *f.* 47, *p.* 2, *l.* 13.
f. 26, *p.* 2, *l.* 9.
f. 46, *p.* 1, *l.* 9.
p. 2, *l.* 14.
Mit. A'chára, *f.* 12, *p.* 1, *l.* 4.
Vyav. May. *p.* 175, *l.* 8.

Question 3.—Three sons of a man became separate, and received their shares of the common property. They did not, however, set apart a share for their mother. Can the deed of division framed by the sons be considered valid?

Answer.—The deed of division may be considered valid, but the sons should be obliged to give a share to their mother.

Rutnagherry, 12*th June* 1851.†

Authority.

Mit. Vyav. *f.* 51, *p.* 1, *l.* 7.
See the first question of this Section.

Remark.

See Introduction § 4 V.

Question 4.—In order to recover the amount of a decree passed in his favour, a man has attached a house of his debtor. The house was once the property of the debtor's father. The debtor's mother claims the removal of the attachment from a half of the house. She alleges that the house was once her husband's property, and that she therefore has a right to one half of it. The question is, whether the widow of the owner of the house has a claim to any part of the house while her sons are still living? and if so, to what extent?

---

† Authorities.

Mit. Vyav. *l.* 47, *p.* 2, *l.* 13.
Vyav. May. *p.* 90, *l.* 2, 3.

Answer.—A son after the death of his father acquires a perfect right to his property, and while sons are alive, the widow has no claim to his property. She cannot therefore claim any share of the house.

Surat, 19th December 1850. †

Remark.

Though the mother cannot claim a partition of the house, still she has a claim to maintenance out of the family property (see Introduction, § 7 I. 1 *b*) extending in amount to a son's share. It seems necessary, therefore, that her rights should be protected against the creditors of her son to this extent, just as those of a separated brother would be. In a case at p. 447 of the N. W. P. Rep. for 1860 it was held that a widow of one of three undivided brothers has no such right to a share of a house, the joint property of the family, as to prevent an effective sale by the surviving brothers, and S. App. No. 13 of 1861 (*Bombay*) was decided on the same principle, but the widow's maintenance is still a charge on the estate not to be avoided by selling it.

SECTION 3.—BETWEEN REMOTER RELATIONS.

Question 1.—One of two brothers left the country, and died 40 years ago. His son, who grew up in the house of his maternal uncle, claims from his paternal uncle a share of his moveable property.

Answer.—He cannot claim a share of whatever his uncle may have acquired by his own labour, without using the claimant's father's means for its acquisition.

Poona, 18th October 1845.

Authority not quoted.

Authority.

* Víramitrodaya *f.* 177, *p.* 1, *l.* 6.
See Introduction § 3 I. Remark 1.

---

† **Authorities.**

Vyav. May. Dáyabhága, *p.* 83, *l.* 7.
Do. Riṇádána, *p.* 179, *l.* 6.

Question 2.—A paternal uncle and a nephew who were united in interests, agreed to an unequal division of property between them. Can they do so?

Answer.—If the nephew has taken a small share of the property from his uncle and given him a deed of acquittance, he is at liberty to do so. Ordinarily he is entitled to an equal share with his uncle.

Ahmednuggur, 30th December 1846.

Authority not quoted.

AUTHORITY.

* Víramitrodaya, *f.* 177, *p.* 1, *l.* 6.

See Introduction, § 3 I. Remark 1.

Question 3.—Two brothers separated, but did not divide their moveable and immoveable property. Can the son of one of them file a suit for a share of the common property?

Answer.—Yes, he can. The property acquired during the time when the family was united in interest must be divided into as many shares as the number of brothers owning it. If one of them is dead, his share can be claimed by his son and grandson.

Rutnagherry, 20th January 1846.

Authority not quoted.

AUTHORITY.

* Víramitrodaya, *f.* 177, *p.* 1, *l.* 7.

See Introduction, § 3 I. Remark 1.

REMARK.

A question of limitation would now generally arise under Act XIV. Sec. I. Art. 13, of 1859.

Question 4.—A deceased person left seven sons, of these three are alive and four dead. Of those that died, three have left one son each and the fourth no son. The deceased father's property consists of one house only. How should each of these sons be allowed to share in the patrimony? Can the share of the brother who died without leaving a son be claimed by all the brothers? Can the

sons of the brothers previously deceased claim the share of the brother who has now died? If so, how should each be allowed to share in it?

Answer.—It appears that the father died leaving seven sons, and that one of them died and has left no sons. His share should be equally divided by the surviving brothers and the three sons of the deceased brothers. The house should be considered divided into six shares, and one share should be assigned to each member of the family.

Broach, 7th September 1848.†

AUTHORITIES.

* 1. Mit. Vyav. *f.* 50, *p.* 1, *l.* 7.
See II. Dig. Chapter I. Sec. I. Q 1.

* 2. Víramitrodaya, *f.* 177, *p.* 1, *l.* 6.
See Introduction § 3 I. Remark 1.

REMARK.

The son of each of the predeceased brothers succeeds to his father's share.

Question 5.—Two brothers paid money in equal proportions, and received a house in mortgage. They subsequently died, one leaving a son and the other a grandson. Unequal portions of the house had however passed into their possession, and the question is whether or not each party has a right to an equal share?

Answer.—Each has a right to an equal share, and the heirs of the mortgagees may divide it so.

Ahmednuggur, 8th May 1851.‡

AUTHORITY.

Víramitrodaya, *f.* 177, *p* 1, *l.* 6.
See Introduction § 3 I. Remark 1.

---

† AUTHORITIES.

Mit. Vyav., Dáyabhága, *f.* 47, *p.* 2, *l.* 13.
f. 50, *p.* 1, *l.* 1.

‡ Vyav. May., *p.* 89, *l.* 2.
p. 169, *l.* 6.
p. 171, *l.* 6.
p. 96, *l.* 2.

CHAPTER III.

SECTION 1.—DISPOSAL OF NATURALLY INDIVISIBLE PROPERTY.

Question 1.—Can a village held on Inám tenure be divided?

Answer.—Any property which, if divided, would not yield equal profit, may be enjoyed by each of the co-sharers in rotation for a certain fixed period.

Dharwar, 14*th September* 1852.†

Remark.

The question is too general to admit of an exact answer. For it is not clear, of what nature the Inám grant was. Usually Ináms which are merely freehold property, or which consist in the Government share of the produce of the land, are divisible either by an actual apportioning of the land or by a division of the produce. See II. Borr. 730 (Ed. of 1863), and C. W. R. IX. C. R. 87. In one case the Suddur Court of the N. W. Provinces ruled that a partition might be refused where it would be obviously detrimental to the interests of the sharers resisting it (see N. W. P. Sel. Dec., 1851, p. 279); but this is not supported by the Hindu authorities.

Question 2.—One of three brothers, who lived as members of an undivided family, died. Can his widow sue on behalf of her son, who is a minor under her protection, for a share of the family property? and can the idols be divided?

Answer.—The woman cannot claim a share of the property unless it be shown that her brothers-in-law are likely to defraud her. The idols may be divided as any other property.‡

Poona, 5*th August* 1852.

---

† Authorities.

Vivádabhangárṇava, in the Chapter called Indivisible Property.

‡ Vyav. May. *p.* 127, *l.* 7.

Vivádabhangárṇava,

AUTHORITY.

Víramitrodaya, *f.* 181, *p.* 2, *l.* 16.
See II. Dig. Chap. I. Sec. 1. Q. 7.

REMARKS.

1. The mother can sue for a division, under the conditions stated, if she is the guardian of her son. See Introduction p. x.

2. The custom regarding family 'idols' is stated to be as follows :—

a. If there is only one image, it is given to the eldest son.

b. If there are several images, the eldest son receives the principal idol, and the rest are divided.

If property has been dedicated to a family idol the members are entitled to worship and take the emoluments in rotation. See Introd. p. xxxv.

QUESTION 3.—Two brothers possess a proprietary right to a well, and use the water to irrigate their respective fields by turns. Can the right of one brother to a half of the well be sold in payment of his debts?

ANSWER.—The well cannot be sold. The debtor having a right only to use it in his turn. A well or door, which is the common property of a family, and which cannot be divided, can only be used by those who have the limited enjoyment of it.

Ahmednuggur, 19th December 1854.

AUTHORITIES.

1. Vyav. May. p. 125, *l.* 5.—

अन्यदप्यविभाज्यमाह मनुः।
वस्त्रं पत्रमलंकारः कृतान्नमुदकं स्त्रियः।
योगक्षेमं प्रचारं च न विभाज्यं प्रचक्षते ॥

Other things exempt from partition have been enumerated by Manu :—

Clothes, vehicles, ornaments, prepared food, water, women, sacrifices and pious acts, as well as the common way, are declared not liable to distribution. (Borradaile, May. Chap. IV. Sect. VII. para. 15.)

2. Vyav. May. p. 127, *l.* 1.—

बृहस्पतिः।
वस्त्रादयोविभाज्या येरुक्तं तैर्न विचारितम्।
धनं भवेत्समृद्धानां वस्त्रालंकारसंश्रितम्।
मध्यस्थितमनाजीव्यं दातुं नैकस्य शक्यते।
युक्त्या विभाजनीयं तदन्यथानर्थकं भवेत्॥
विक्रीय वस्त्राभरणमृणमुद्ग्राह्य लेखितम्।
कृतान्नं चाकृतान्नेन प[illegible] विभज्यते॥
उद्धृत्य कूपवाप्यम्भः स्वानुसारेण भुज्यते।
यथाभागानुसोरण सेतुः क्षेत्रं विभज्यते।

Bṛihaspati: They by whom it is affirmed that clothes and the like are indivisible, have not proved that the collected wealth of opulent men, their vehicles and ornaments, shall not be divided; † property, held in common, (would be) unemployed, for it cannot be given to one (in exclusion of another): therefore it must be divided by (some mode deduced from) reasoning ‡; else it would be useless. By the sale of clothes and ornaments, on the recovery of a written debt, by compensating the dressed food with (an equal allotment of) undressed grain; an (equitable) partition is made. Water drawn from a (single) well or pool shall be taken by turns . . . . . . A bridge and a field shall be shared (by co-heirs) in due proportion. (Borradaile, May. Chapt. IV. Sect. VII. para. 22.)

REMARK.

When it is said that the water of a well cannot be divided, the meaning is that it cannot be distributed like land or money. But the ownership admits of a mental division, to which effect is given by an agreement to use the (physically) undivided thing in turns,

† The translation of the second line ought to run thus :—

"They . . . . . have not considered, that the property of opulent men may consist of clothes and ornaments and such property."

‡ Yuktyá, "by (some mode deduced from) reasoning," may be better translated, "according to (the rules of) equity."

and if the terms of the partition in this case were that each brother should take the water by turn for the irrigation of particular fields, each acquired a distinct property transferable along with that in the fields to be irrigated (as thus only could it be made available), and saleable in execution of a decree along with the fields themselves. As to the needlessness of a partition in specie to constitute separate property &c., see the Introduction, p. xii., and the case of Appuviar *vs.* Ramsubbayana, C. W. R. VIII. Pr. Co. 1.

Question 4.—Certain brothers divided all their property excepting a well, a privy, and a compound. It appears that no partition can be made in regard to the former two, but that the latter may be divided, though not without inconvenience, by building up a wall in the middle. The question is, whether or not it should be divided?

Answer.—It is not necessary to divide a well, a privy, and a compound. There are rules which forbid the division of such property.

Poona, 18th July 1851.†

AUTHORITIES.

See the preceding Question.

REMARK.

A compound may be divided under ordinary circumstances. If however, in this case, the 'inconvenience' arising from its division would be of such a nature as to diminish or impair the rights of one of the co-heirs, *i.e.* prevent his using the compound for its intended purposes, then it must be used by all in common.

This, as all similar cases, must be decided according to the rules of equity.

---

† AUTHORITY.

Vyav. May. *p.* 125, *l.* 5.

SECTION 2.—DISPOSAL OF PROPERTY DISCOVERED AFTER PARTITION.

Question 1.—A hoard of treasure was discovered in an ancestral house which was pulled down. The treasure was not divided between the cousins twice removed. The cousins had become separate 40 years ago, when the house was assigned to one of them as a part of his share. The hoard was found in this house, and the question is, whether the other cousin should have a share of it?

Answer.—Whenever any ancestral property is discovered, it should be divided. The treasure should therefore be divided.

Poona, 14*th July* 1855.

Authority.

Vyav. May. *p.* 129, *l.* 1—

मनुः ॥
विभागे तु कृते किंचित्सामान्यं यत्र दृश्यते ।
नासौ विभागो विज्ञेयः कर्तव्यः पुनरेव सः ॥

Manu: When any common property whatever is brought to light, after partition has been effected, that is not considered a (fair) partition; it must even be made again. (Borradaile, May. Chapter IV. Section VII. para. 26.)

Remark.

The answer is right, supposing it can be proved that the treasure was concealed by an ancestor of the now divided claimants. As to the disposal of treasure trove in general, see Vyav. May. Chapter VII. para. 10.

Question 2.—There are three brothers. One of them claims a share of certain immoveable property on the ground that it was not divided along with the rest. The other brothers do not prove that the property was divided. How should the question be decided ?

Answer.—If the fact of the division be in dispute, the whole of the property may be redivided. If the fact of the division of a part of the property is agreed to, the undivided portion only may be divided.

Rutnagiree, 6th March 1856.†

AUTHORITY.

Vyav. May. *p.* 129, *l.* 1.

See the preceding question and the Introduction.

REMARK.

The first proposition in the Shastri's answer is laid down much too broadly. A mere dispute will not entitle any separated member to claim a repartition. See Colebrooke, Dig. Bk. V. Chapter VI. Text 378.

Question 3.—Each of the members of a family received his share of a Vṛitti‡ which was divided among them. The actual extent of the land, however, was subsequently found to be in excess of that taken as the basis of the partition. Should the excess be divided among the sharers ?

Answer.—Any new property discovered after the partition of the known property of a family should be divided among the sharers.

Dharwar, 16*th February* 1852.§

---

† AUTHORITIES.

Vyav. May. *p.* 128, *l.* 2.
133, *l.* 1.

‡ Land or hereditary property, or office, which is the means of subsistence of a family.

§ Vyav. May. *p.* 90, *l.* 2.
l. 6.
p. 128, *l.* 2.
p. 129, *l.* 1.

AUTHORITY.

Vyav. May. *p.* 129, *l.* 1.
See II. Dig. Chapter III. Sec. 2, Q. 1.

QUESTION 4.—A man had three sons. The eldest of them gave a writing to his father, engaging that he would not commit any fraud in regard to the money and jewels given by him to his mother. The property was estimated at Rs. 3,000. The father is now dead and the eldest son has run away. Property valued at 1,200 Rupees only has been discovered. The second son is in league with the eldest. The third son is a minor. Their mother claims the whole of the property which has been discovered on the ground that her husband gave it to her. The question is, how should the property now discovered and that which may hereafter be discovered be divided?

ANSWER.—It is illegal for a man to give his whole property to his wife in disregard of the claims of his sons. The property should therefore be divided into four shares, of which one should be allotted to the mother and three to the three sons.

Poona, 10*th September* 1853.†

REMARKS.

1. If the property had been acquired by the father himself, he would, according to the ruling of the Bombay H. C. (see above, page 18) be at liberty to dispose of it at his pleasure, and, in this case, the donation to the widow would be legal, if it could be proved.

---

† AUTHORITIES.

Mit. Vyav. *f.* 69, *p.* 1, *l.* 4.
f. 51, *p.* 1, *l.* 7.

A similar answer was received from—
Rutnagherry, 27*th October* 1851.

2. The Shastri's opinion, that each of the sons is to have a share, even the eldest, who ran away, is not quite correct. For, though, according to the Mitákshará and the Víramitrodaya, fraud practised by one of the co-sharers, does not disqualify him from receiving a share (see Introd. pp. xi. xii.), still, it would seem, that he ought to be held liable for any ascertained portion of the share which he might have made away with. Hence the absconded son ought not to receive a share of the Rs. 1,200, since the portion of the Rs. 1,800 which he must be supposed to have made away with, amounts to more than his own share.

The liability of the fraudulent coparcener to make good any ascertained portion of fraudulently concealed property, is laid down explicitly. Colebrooke, Mit. Chapter I. Sec. IX. paras, 1—3; Mayúkha, Chapter IV. Sec. VII. para. 24. The rule extends to fraudulent or unjustifiably extravagant expenditure during the state of union. See Colebroke, Dig. Bk. V. Chapter VI. Text 373.

In regard to the last point it ought, however, to be borne in mind, that a proportionately large expenditure on the part of one brother ought to be proved to have been clearly 'dishonest.' Otherwise it cannot be deducted from his share. The Víramitrodaya, *f*. 220, *p*. 2, *l*. 5, says on this point :—

अविभागकालेनेन बहुभुक्तमित्यपि न वक्तव्यं भुक्तमपि
राज्ञा ग्राह्यमित्याशयेनाह स एव ॥
बन्धूनामविभक्तानां भोगं नैव निवर्तयेदिति ॥
नहि न्यूनाधिको भोगो वारयितुं शक्योवर्जनीयत्वादिति
भाव : ॥

"In order to show, that (one brother) ought not to say of the (other), 'He has consumed (too) much, whilst we were undivided,' and that the king ought not to allow (the others) to take (back) that which may have been consumed (in excess of his portion by one of them), the same (author, Kátyáyana) says: 'He shall certainly not cause to be paid back property, which the brothers consumed, while living in union.' The bearing (of this text is); that enjoyment (of the common property) in unequal proportions cannot be forbidden, because it is unavoidable."

The same remark applies to the second son, if it can be proved that he really participated in the fraud.

The proper division of the recovered Rs. 1,200, therefore, seems to be one in equal shares between the mother and the minor son.

3. In regard to property in excess of the Rs. 1,200 that might be discovered afterwards, such property ought in the first instance to be used to make up the full shares of Rs. 750, to which the mother and the minor were originally entitled. Afterwards only the rights of the two fraudulent coparceners can be taken into account.

SECTION 3.—LEGALITY OF PARTITION.

Question 1.—A father divided his property between his two sons. They then executed a deed of separation which continued to be respected for about 8 years. Afterwards the father executed a document in favour of one of his sons in the absence of the other, modifying the terms of the deed. Has the father authority to do so?

Answer.—It appears that certain property was first set apart for the maintenance of the father and mother, and the rest divided between the sons. The father cannot therefore modify the terms of the deed of separation without the consent of both his sons.

Poona, 15*th September* 1845.

Authority not quoted.

AUTHORITIES.

* 1. Manu. IX. 47—

सकृदंशो निपतति सकृत्कन्या प्रदीयते।
सकृदाह ददानीति त्रयमेतत्सतां सकृत् ॥
पित्रादिधनविभागो भ्रातृणां धर्मतः कृतः सकृदेव न पुनरन्यथा क्रियत इति ॥

Once is the partition of an inheritance made; once is a damsel given in marriage; and once does a man say "I give:" these three are, by good men, done once for all (and invariably). (Sir W. Jones.)

Kullúka's gloss :—

'A partition of the wealth belonging to the father and others, which has been *made by brothers according to law,* is made once only, and cannot again be changed.'

* 2. Víramitrodaya, *f.* 223, *p.* 2, *l.* 8—

यत्तु मनुनैवोक्तं सकृदित्यादि तत्परावृत्तिकारणाभावे ॥

"But what has been said by Manu, 'Once is the partition of an inheritance made,' &c., that (applies to cases) where there is no ground for annulling that (partition)."

Remark.

Right, if the first partition had been made in accordance with the law, that is, in due proportions, or by mutual assent. See Sir T. Strange, H. L. (*4th Ed.*) *p.* 359 (14) : where however the word "void" is substituted for "valid ;" and Sp. Ap. 3150 ; I. By. S. D. C. 167.

Question 2.—A man possesses some houses and shops. Of these, all the shops and one house were given by him to his three sons, who live separate from him. The father has filed a suit for the recovery of the property in the possession of his sons. The property was acquired by by the father himself. Can he claim it ?

Answer.—No sooner is a son born than he acquires a right to his father's property, but if he wishes to have a share in his father's property, he cannot have it unless his father is willing to give it to him. If the father is very old or of a bad character, his son has a right to insist upon a division of his property, even though the father is unwilling. †

Dharwar, 15*th December* 1853.

Authorities.

See the preceding case.

---

† Authorities.

Vyav. May. *p.* 91, *l.* 2.

l. 7.

Remark.

The Shastri's answer is not to the point. If the father had really made a division, and if the division had been made according to the law, *i. e.* under the observance of the rules detailed above, or, with the consent of all parties, even against those rules, it stands good. As to the relation of the passage in the Mitákshará corresponding to that (Borradaile V. M. Chapt. IV. Sec. IV. para. 7) quoted by the Shastri (Coleb. Mit. Chapt. I. Sec. II. para. 7) to Sec. V. paras. 8, 11, reference may be made to I. M. H. C. R. 77.

Question 3.—The common property of two brothers amounted to 30,000 Rs. One of them obtained a Fárikhat from the younger brother by offering him about 7,000 Rs. in full payment of his share. A part of it was paid, but in consequence of the non-payment of the rest the younger brother filed a suit against his brother to oblige him to pay a moiety of the whole property. Is this in accordance with the Shastras?

Answer.—When a person thinks himself able to acquire property or is otherwise unwilling to take his share, it is directed that a small portion should be given to him at the time of his separation. It is also enjoined that the Sirkar should prevent the person whose claim has been thus compounded from making a further demand afterwárds. The younger brother therefore can only claim what he agreed to receive at the time of writing the Fárikhat. His claim to a moiety is not proper.

Tanna, 28*th July* 1849. †

---

† Authorities.

Vyav. May. *p.* 9, *l.* 2.
p. 134, *l.* 1.
Manu, Chapter IX. verse 207.

A similar answer was received from Khandesh Zilla, under date the 17*th February* 1854.

AUTHORITIES.

1. Vyav. May. *p*. 134, *l*. 1—

स्वेच्छया विभक्तं पुनश्च विवदमानं प्रत्याह स एव ॥
स्वेच्छाकृतविभागो यः पुनरेव विसंवदेत् ।
स राज्ञांशे स्वके स्थाप्यः शासनीयोऽनुबन्धकृत् ॥

The same author, with reference to one separated by his own wish, and afterwards disputing, says : If he subsequently dispute a distribution, which was made with his own consent, he shall be compelled by the king to abide by his share, or be amerced if he persist in contention. (Borradaile, May. Chapt. IV. Sect. VII. para. 38).

* 2. Mit. Vyav. *f*. 52, *p*. 1, *l*. 13—

अथ सर्वविभागशेषं किंचिदुच्यते ।
अन्योन्यापहृतं द्रव्यं विभक्ते यत्तु दृश्यते ।
तत्पुनस्ते समैरंशैर्विभजेरन्निति स्थितिः ॥

"Something is here added respecting the residue of a general distribution of the estate.†

"Effects which have been withheld by one co-heir from another, and which are discovered after the separation, let them again divide in equal shares : this is a settled rule."—(Colebrooke, Mit. Chapt. I. Sect. IX. para 1.)

REMARK.

The Shastri's answer is not quite to the point. If the younger brother agreed, knowing or having the means of knowing the facts, to an unequal division, then it holds good (Auth. 1). If he was induced to consent to it by fraudulent representations, then he is not bound by his agreement (Auth. 2). See also Introduction § 4 V. and Remark.

QUESTION 4.—Four brothers divided their interests. The share of a certain piece of land which one of them

† The translation of the first sentence ought to run as follows :—
"Now something is declared which is a supplement (ary rule to be observed) at all Partitions."

received was attached by Government. He therefore claims a new share of the land in possession of his brothers. Can he do so?

Answer.—No.

Dharwar, 11th April 1849.

AUTHORITY.

Manu IX. 47.

See II. Dig. Chap. III. Sec. 3, Q. 1.

REMARK.

The Shastri's answer is right only on the supposition that no fraud was committed in making the division, and that the claim for which the land was attached, was not an old unsettled claim against the family estate. For, as regards the first point, 'fraud in Hindu Law, vitiates every transaction.' Introd. § 4 V. Remark. As to the second point, if there was an old claim against the family estate, which, on partition, had not been taken into account, and for which the portion of one brother was afterwards attached, it would seem, that the latter would have a right to claim compensation from the others. For '*a partition made according to the law,*' to which alone the authority quoted by the Shastri refers, presupposes an equal division of the family debts. See Introd.' § 7 II. 1.

It seems not improbable that by "attached" is meant 'resumed,' that is reduced from 'Inám' or rent-free land to 'khalsat,' paying revenue, to the entire exclusion of the former Inámdár if the land was held by an hereditary cultivator. In this case the same rule would apply.

Question 5.—Certain brothers wrote a memorandum regarding their separation. Afterwards they remained together for a year and then divided their property. The question, therefore, is, whether the separation should be considered to have taken place from the date of the memorandum, or from the date of the actual separation? and should expense incurred during the year be set to the account of the family, or should each man's expenses be laid upon him individually?

Answer.—The brothers should be considered united in interests so long as they take their meals together. The expense during the year should therefore be set to the account of the family. If any one should have expended any money on his own private account, it should be charged to him alone. The separation should be considered to have taken place from the date on which they actually divided the property and began to perform "Naivedya" (food-offering to gods) and "Vais′vadeva" (the burnt-offering to fire) ceremonies separately.

Sudder Adawlut, 21*st May* 1833.

Authority not quoted.

REMARKS.

1. The Shastri's view seems to be, that the memorandum has no value, because it was not carried out.

2. But Partition is primarily a mental act. If the brothers therefore agreed on a partition and drew up a document setting forth the division of their estate, this act constitutes a partition and it is unnecessary to carry it out by a physical distribution of the property. They must be considered divided from the time at which the writing was signed. If, afterwards, a year elapsed before the intentions declared in the writing were carried out the expenses must be divided in due proportion, and be paid by each brother out of his share. See Introduction § 4, III. 1, p. xii. In many of the older cases separate possession was held essential to constitute a binding partition. See Sir T. Strange, H. L. (4*th Ed.*), p. 361. At Bombay it was held that a deed of partition must have been acted on (III. S. D. C. 236). These cases show that the Shastri's view has been extensively held, but see now Sutherland's P. C. J. 657.

AUTHORITY.

Vyav. May. *p.* 89, *l.* 8—

द्रव्यसामान्याभावेपि त्वत्तोहं विभक्त इति व्यवस्थामात्रेणापि भवत्येव विभागः।

बुद्धिविशेषमात्रमेव हि विभागः। तस्यैवाभिव्यञ्जिकेयं व्य-वस्था ॥

'Even when there is a total failure of common property, a partition may also be made by the mere declaration, "I am separate from thee." A partition may even be a mere mental distinction. This exposition clearly distinguishes the various qualities of this [term].'† Borradaile, May. Chapt. IV. Sect. III. para 2.

Question 6.—One brother passed a Fárikhat to another, but it was not carried out for a long time. One of the brothers and his son died. The question is whether the widow of the deceased can get her husband's share as specified in the Fárikhat?

Answer.—Yes, she can.

Tanna, 15th October 1858.‡

Remarks.

1. The Shastri's authorities refer only to the right of a widow to inherit her '*separated*' husband's property.

2. For authorities see the preceding page, and Introduction § 4, III. p. xii. A *suit* for partition, however, conveys no right to the coparcener's widow (Sp. App. 691 of 1865), and at Madras it has been ruled that even a decree, if not executed, will not have this effect (Strange, Manual, H. L. Art. 290). Compare the Vyavasthá at p. 175, with the rule enunciated at p. 178 of Sutherland's Pr. Co. Judgments.

Question 7.—Three persons drew up a memorandum regarding the division of their family property. Each received his share of everything except the Vṛitti, which was left under the management of one person acting on

† The translation of the last lines ought to run thus :—
' For partition is merely a particular kind of intention. The declaration ("I am separate from thee") indicates this.'

‡ Authority.

Vyav. May. *p.* 134, *l.* 4.
p. 136, *l.* 4.

behalf of all the co-sharers. Afterwards when the adopted grandson of a deceased co-sharer was on the point of death, the sharers framed a memorandum in triplicate, setting forth the division of the Vṛitti. The original memorandum was duly signed, and attested by the sharers, but before the duplicate and triplicate could be signed, the man on the point of death expired. Can his widow under such circumstances claim a share of the Vṛitti?

Answer.—If a share of the Vṛitti has been assigned to the adopted grandson, his widow who has no son, can claim it. If a share has not been assigned to the husband, the widow cannot claim it. It is for the Court to determine whether the incompleteness of the duplicate and triplicate of the memorandum of division leads to the supposition that a partition of the Vṛitti was not made.

Zilla Tanna, 19th January 1859.

Authority not quoted.

REMARK.

See the preceding question and Introduction § 4, IV. Remark.

Question 8.—There were five brothers who divided their father's moveable property into five shares, each of them taking one. The immoveable property was left for the maintenance of the father, with an agreement that, after his death, it also should be equally divided among them. One of the brothers subsequently died, and his death was followed by that of his father. The widow of the former claims one-fifth of the immoveable property as the share of her husband. Is this claim right?

Answer.—As the family is divided, the widow is entitled to the share which was assigned to her husband.

Dharwar, 31*st December* 1847.†

REMARK.

The widow cannot claim any portion of undivided family property (Introduction § 4, IV. Remark), but if there was an agreement amongst the co-parceners that the property should be divided amongst them in definite shares, subject only to the father's enjoyment for life of the whole, it would appear that the Courts would regard this as a partition conferring a right of inheritance on the widow. See Introduction, § 4, III. 1, and Remark 2 under Q. 6.

SECTION 4. PARTIAL DIVISION.

Question 1.—One of three brothers desires to have a share of his father's house without insisting on the division of the whole property. Can he do so?

Answer.—The Shastra allows sons to take equal shares of their father's property, but there is nothing to prevent one of them from demanding the share of any particular portion of such property.

Dharwar, 28*th January* 1848.‡

REMARK.

The partial division may take place by consent, but the brother cannot insist on it. See Bombay Selected Cases, p. 175 (p. 153 of 1st Edition). The same principle was subsequently affirmed in Sp. Ap. No. 3948, 27th Sept. 1858. See also Introd. § 4, IV. p. xv.

Question 2.—Certain members of a divided family of the Kuṇabí caste lived together again, as a family united in interest, and held their ancestral estate in common. They afterwards separated leaving some property undi-

---

† AUTHORITIES.

Vyav. May. *p.* 90, *l.* 1.
p. 134, *l.* 4.

A similar answer was received from—
Khandeish, 26*th September* 1857.

‡ Mit. Vyav. *f.* 47, *p.* 2, *l.* 13.

A similar answer was received from—
Sholapoor, 28*th September* 1849.

vided in possession of one of them. After some time, the other members claimed a share of the undivided property. Can the exclusive enjoyment of the property by one member of the family be a bar to the claims of the other members ?

Answer.—If the members of a divided family become united in interests and again separate themselves from each other, they are still entitled to a share of the common property; even though it may, on their second separation, have remained in possession of one of them.

Ahmednuggur, 19*th July* 1847.†

Remark.

As there are no particular provisions in the law-books regarding a partial division, it is impossible to prove the correctness of the Shastri's view by any explicit passages. Still it appears to be founded on the reason of the law. See Introduction § 4 IV. and Remark.

Question 3.—There are two claimants to a Wattan. One of them has had the management of it for a long time. Can the one who has not the management claim a share in the emoluments ?

Answer.—All the descendants of the person who acquired the Wattan have a right to a share of it. There is nothing in the Shastras which prevents a descendant

† Authorities.

Mit. Vyav. *f.* 45, *p.* 1, *l.* 5.
f. 40, *p.* 1, *l.* 4.
f. 49, *p.* 1, *l.* 10.
Vyav. May. *p.* 143, *l.* 2.
p. 128, *l.* 1.
l. 3.
l. 5.
Manu, Chapter X. verse 105.

from claiming his share, because he does not manage the affairs of the Wattan.

Ahmednuggur, 1*st March* 1851.†

REMARK.

The Shastri regards the Wattan (service holding) merely as a private estate with a certain obligation attached to it as a whole, not affecting the rights of the coparceners *inter se*. For the Regulation law on the subject, see Reg. XVI. Section 20 of 1827, and the cases quoted under it in West's Code. Different views have been held at different times as to the nature of this kind of property. The opinion of the Hon. Mountstuart Elphinstone appears from some MS. notes collected by one of the Editors, to have been very nearly that of the Shastri. The late Suddur Court of Bombay at one time held that the mortgage prior to 1827 of a Wattan was valid, but only for the life-time of the wáttandár mortgagor, S. D. A. R. for 1848, p. 93. By subsequent decisions it was ruled that mortgages prior to the passing of Reg. XVI. were not to be subjected to the rule there laid down. Sp. Ap. 2998, 3042. S. D. A. C. II. 26, 29. Then it was held that, except the portion set aside under Act XI. Sec. XIII. of 1843 for the office-holder, a Wattan is permanently alienable : Sp. Ap. 3030, 3224 ; S. D. A. C. III. 131, 142. But in the end the doctrine was adopted that a sale was invalid even as to the vendor's life-interest : Sp. Ap. 2830. The Courts will distribute the surplus produce of a Wattan, though it cannot leave the family. See Sp. Ap. 2691, 3005 &c.

QUESTION 4.—A woman has brought an action against her brother-in-law for the recovery of her son's share of property. She urges that during the lifetime of her son, some of the family property was divided, but that it is for a share of the remainder that she now sues.

---

† AUTHORITIES.

Víramit. *f*. 175, *p*. 2, *l*. 6.
Mit. Vyav. *f*. 50, *p*. 1, *l*. 7.
Vyav. May. *p*. 94, *l*. 3.

Answer.—She cannot claim any share, unless on the ground of some special agreement entered into by the parties when the division first took place.

Dharwar, 1st March 1849.†

REMARK.

See Introduction § 4 IV. Remark. The Shastri, probably, means to say, that the mother can claim her son's property only if an agreement to divide had been made during his life-time.

Question 5.—*A*, a man of the S'údra caste, separated himself from his brother *B*, but left the family Wattan undivided. A few years afterwards *A* died, leaving his widow *C* pregnant. Should *C* be considered as the heir of *A*, from the date of *A*'s death until her delivery, and is she during this period competent to recover from her brother-in-law *B* her husband *A*'s share of the Wattan? If *C* be delivered of a son, will *C* and her son be entitled to separate shares of the Wattan?

Answer.—On the death of a man who has separated himself from his family, his son or adopted son is his heir and is entitled to inherit his property. If he leave no son, his widow, daughter, and other relatives, in the order of precedence laid down in the Shastras, inherit his property. If a brother who has not separated from the family die, leaving a pregnant widow, the division of the family property should be deferred till she be delivered. If a son be born, though his father is dead, he should be allowed the share to which his father would have been entitled. Though a grandson be supported from the proceeds of his grandfather's property, his claim to recover a share from his uncle, or his uncle's son, is in no

---

† AUTHORITY.

Vyav. May. *p.* 89, *l.* 6.

way prejudiced. If at the time of the division of the family, any property may have been concealed, it should be divided whenever it is discovered. In the case stated in the question, *C*, while pregnant, is *A*'s heir. If she bring forth a son he becomes his father's heir, and as such is entitled to recover his father's share of all the moveable and immoveable property of the family. From the date of her son's birth, *C* is no longer entitled to claim *A*'s share of the property.

Tanna, 26*th June* 1848.†

REMARK.

See the preceding cases, and Introduction § 4. IV. Remark. Regarding the rule of deferring a partition until the delivery of a coparcener's pregnant widow, see Introduction § 4 II. 1.

---

† AUTHORITIES.

Mit. Vyav. *f.* 55, *p.* 2, *l.* 1.
51, *p.* 1, *l.* 1.
50, *p.* 1, *l.* 1.
52, *p.* 1, *l.* 13.
Vyav. May. *p.* 96, *l.* 3.

CHAPTER IV.

EVIDENCE OF PARTITION.

Question 1.—Can the separation of a family be held to have taken place when there is no documentary evidence to prove it.

Answer.—A Fárikhat or written instrument attested by the members of the family is the necessary proof of separation.

Ahmednuggur, 1845.

Authority not quoted.

Remark.

A 'Fárikhat' is not necessary in order to prove a division. The doctrine enunciated by the Shastri was adopted by the Suddur Court in some of the older cases, as in Sp. App. 3334 S. D. III. 108. But in Sp. App. 3348, S. D. A. C. I. 22, and Sp. App. 3661, S. D. IV. 100, this rule was abandoned, and now it is clear that partition may be proved like any other fact. See Coleb. Dig. Bk. V. Chap. VI. T. 381.

Vyav. May. p. 132, *l.* 8—

येषामेताः क्रिया लोके प्रवर्तन्ते स्वरिक्थषु ।
विभक्तानवगच्छेयुर्लेख्यमप्यन्तरेण तान् ॥

Those by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence. (Borradaile, Mayúkha, Chapter IV. Sec. VII. para. 34.) See the Introduction § 4. III. 1.

Question 2.—A man had two wives. The elder has one son, and the younger has four sons. The man divided his property into five shares, assigning one to each of his sons. The son of the elder wife executed a writing to the other four to the effect that he would never interfere in any matter concerning them, and that they were at liberty

to settle among themselves any questions respecting their affairs. After this one of the four brothers died without issue. Subsequently the son of the elder widow, having received some produce of a field, offered three-fifths to the three surviving brothers. They assert their right to four-fifths. How is this question to be decided?

Answer.—The three full brothers of the deceased are his heirs. The half-brother cannot claim to be his heir. It will rest with the Court to consider the weight and effect of the writing passed by the half-brother.

Dharwar, 24th April 1854. †

REMARK.

The facts of the case seem to be these: The father of the five brothers had effected a division, which, in part at least, was a so-called 'phalavibhága' or division of produce. The eldest brother, who appears to have been the manager of the estate, left undivided *in specie*, had given to his younger brothers a document confirming the division. Afterwards, on the death of one of the younger brothers he seems to have disputed the division, and appropriated that share of the produce of the undivided property which would have gone to the deceased half-brother. Under these circumstances the division would be proved by the document and by the receipt of separate shares, by the brothers. As the brothers were divided, the full brothers inherit before the half-brother.

Question 5.—Two uterine brothers prepare and take their meals separately. Is this practice a sufficient evidence of the separation?

Answer.—When two brothers perform the s'ráddha of their father separately, and when they have separate trade and separate means of maintenance, they may be considered

† AUTHORITY.
Vyav. May. *p.* 134, *l.* 4.

separated, and in this case no documentary evidence is necessary. A verbal declaration of separation is also sufficient evidence in case the brothers have no property which they can divide.

Surat, 4th September 1845.

Authorities not quoted.

AUTHORITY.

* Vyav. May. *p.* 133, *l.* 2—

अन्यान्यपि विभागलिङ्गान्याह नारदः ।
साक्षित्वं प्रातिभाव्यं तु दानग्रहणमेव च ।
विभक्ता भ्रातरः कुर्युर्नाविभक्ताः परस्परम् ॥
दानग्रहणपश्वन्नगृहक्षेत्रपरिग्रहाः ।
विभक्तानां पृथग्ज्ञेया दानधर्मागमव्ययाः ॥
येषामेताः क्रिया लोके प्रवर्तन्ते स्वरिक्थिषु ।
विभक्तानवगच्छेयुर्लेख्यमप्यन्तरेण तान् ॥

Nárada declares also other signs of partition: Separated but not unseparated, brethren, may reciprocally bear testimony, become sureties, bestow gifts, and accept presents. Gift and acceptance, cattle and grain, houses, land, and attendants, must be considered as distinct among separated brethren, as also the rules of gift, income, and expenditure. Those, by whom such matters are publicly transacted with their co-heirs may be known to be separate even without written evidence. (Borradaile, May. Chapt. IV. Sect. VII. para. 34.)

REMARK.

See also Introduction, § 4. III. 2.

QUESTION 4.—What are the signs of the separation of a father and a son ? A father and a son of his younger wife live in one and the same house. The son of the elder wife has been living in a separate house for about 20 years. The property of the father has not been divided, nor has the elder wife's son received any share. He was in the habit of performing the sacrifice called

'Vais'vadeva' † on his own account. Should he be considered a separated member of the family? and can any man whose food is cooked separately perform the ceremony, or is it a sign of separation? Since the death of the father the elder son has joined the family, and assuming the guardianship of his stepbrothers, has got them married. Can the stepbrothers claim a share of the property acquired by the elder brother during the time he was away from the family. Can the elder brother claim a share of the ancestral property?

Answer.—Those members of a family who individually perform the ceremonies of 'Vais'vadeva' and 'Kuladharma,' ‡ and have signed a Fárikhat, may be considered separated. It does not appear from the Shastras that the elder son of a person is obliged to perform the 'Vais'vadeva' on his own account, although his father and step-brother are united in interests and he himself lives and cooks his food separately in the same town without receiving the share of his ancestral property. A person may, however, perform the ceremony by the permission of his father. The Shastra authorises the elder son of a man to take possession of the ancestral property, and protect his younger brother and mother. A son who has not made use of his father's means, and who has declared himself separate and has acquired property through his learning, enterprize, &c., is not under the obligation of allowing shares of his property to his brothers. They can claim shares of the ancestral property only.

Ahmednuggur, 13*th April* 1847.§

† This ceremony is performed for the sanctification of food before dinner.
‡ The ceremonial worship of the tutelary deity.

§ Authorities.
Vyav. May. *p.* 129, *l.* 2.
p. 129, *l.* 4.
p. 133, *l.* 2.
Mit. Vyav. *f.* 25, *p.* 1, *l.* 9.
f. 48, *p.* 2, *l.* 5.

AUTHORITY.

Mit. Vyav. *f.* 48, *p.* 2, *l.* 5—

पितृद्रव्याविरोधेन यदन्यत्स्वयमर्जितम् ।
मैत्रमौद्वाहिकं चैव दायादानां न तद्भवेत् ॥

That which had been acquired by the coparcener himself without any detriment to the goods of his father or mother; or which has been received by him from a friend or obtained by marriage, shall not appertain to the co-heirs of brethren. (Colebrooke, Mit. Chapter I. Sec. IV. para. 2.)

REMARKS.

1. For a full enumeration of the signs of a partition, see Introduction § 4, III. 2.

2. The Shastri is right in not considering the separate performance of the 'Vais'vadeva' as a certain sign of 'partition,' though it is enumerated in the Smṛitis among these signs. The general custom is, in the present day, that even undivided coparceners, who take their meals separately, perform this ceremony, at least once every day, each for himself, because it is considered to purify the food. We subjoin a passage on this point from the Dharmasindhu :—

Dharm. *f.* 90, *p.* 2, *l.* 3 and 6 (Bombay lith. ed.) :—

जुहुयात्सर्पिषाभ्यक्तैर्गृह्येग्नौ लौकिकेपि वा ।
यस्मिन्नग्नौ पचेदन्नं तस्मिन्होमो विधीयते ॥
अविभक्तानां पाकभेदे पृथग्वैश्वदेवः कृताकृत इति भट्टोजीये ॥

'Rice mixed with clarified butter should be offered in the sacred domestic fire, or in a common fire. The oblations (at the Vais'vadeva) should be made in that fire, with which the food is cooked. . . . . Bhaṭṭojídíkshita declares that, if members of an undivided family prepare their food separately, the Vais'vadeva-offering may be performed separately (in each household) or not.

QUESTION 5.—A man had three sons. They used to live and take their meals separately in a house which was their ancestral property. They all subsequently died. A

son of one of them claims a moiety of the house from the son of the other. The defendant in this case takes no objection to the equal division of the house. The widow of the third brother has joined the plaintiff.

The house, which is the ancestral acquisition of the family, appears to be undivided property. Should the above-mentioned claimants be allowed under these circumstances equal or different shares in it ?

Answer.—Preparing food and taking meals separately by brothers is considered by the Shastras to be a mark of separation. According to this rule the three brothers are duly separated. Each of them has an equal share in the property. The widow of one of them should be allowed one-third of the house as the share of her husband.

Surat, 29th November 1853.†

REMARKS.

1. 'Preparing food and taking meals separately' is by itself not a sufficient proof of separation. See Introd. § 4. III. 2.

2. If the ancestral house was undivided, as stated in the question, the widow must be allowed the use of it, and has a lien on it for her maintenance, but can in no case inherit it. See Introd. § 4. IV. Remark.

Question 6.—Four uterine brothers lived separately in a house belonging to their father. They had neither divided their property nor passed deeds of separation to each other. They, however, used to take their meals separately. Afterwards all of them died. The eldest of them has left a widowed daughter-in-law. She has a maiden daughter. Two sons of her father-in-law's brother are alive. A creditor of one of them has attached the whole house. The widowed daughter-in-law has applied for

---

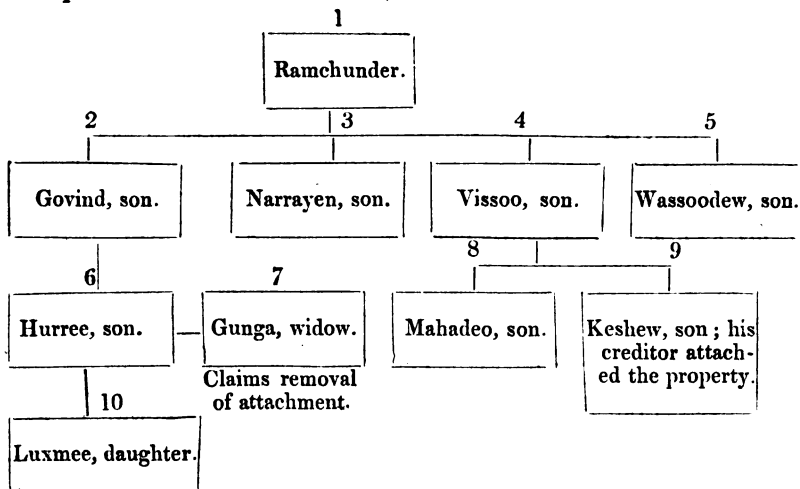
† AUTHORITY.

Vîramit. Dáyabhága, *f.* 223, *p.* 1, *l.* 12.

the removal of the attachment from that portion of the house which consitutes her husband's share. The question therefore is, whether, according to the Shastras, and by reason of the four brothers having lived separately, their property, excepting the house in dispute, should be considered as divided, and whether the daughter-in-law can claim a share of it?

Answer.—Although there is no documentary evidence to show that the brothers were separate yet, as their places of living, meals, and business, were separate, they should be considered separated. Their property, including the house in which they lived, must also be considered divided. When any one, after the division of the property in which he has a share is dead, his widow has a right to that share.

Surat, 16th December 1847.†

The following genealogical table will be found to illustrate the question:—

† Authorities.

Vyav. May. *p.* 129, *l.* 3.
p. 132, *l.* 4.
p. 134, *l.* 4.
p. 134, *l.* 8.

AUTHORITIES.

1. Vyav. May. *p.* 129, *l.* 2—

केनचिद्विभागस्यापलापे निर्णायकान्याह याज्ञवल्क्यः ।
विभागनिह्नवे ज्ञातिबन्धुसाक्ष्यभिलेखितैः ।
विभागभावना ज्ञेया गृहक्षेत्रैश्च यौतकैः ।

Yâjñavalkya states the modes of decision in case of denial of partition made by any one : "When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof, or by house or field" (separately possessed). Borradaile, May. Chapt. IV. Sec. VII. para. 27.

2. Vyav. May. *p.* 132, *l.* 4—

बृहस्पतिः ।
पृथगायव्ययाधानं कुसीदं च परस्परम् ।
वणिक्पथं च ये कुर्युर्विभक्तास्ते न संशयः ॥

Brihaspati :—They who have their income, expenditure, and wealth distinct, and have mutual transactions of money lending and traffic, are undoubtedly separate.

3. Vyav. May. *p.* 134, *l.* 4—

तत्राविभक्तस्यासंसृष्टिनो धनग्रहणे क्रममाह याज्ञवल्क्यः ।
पत्नी दुहितरश्चैव पितरौ भ्रातरस्तथा ।
तत्सुता गोत्रजा बन्धुशिष्यसब्रह्मचारिणः ॥
एषामभावे पूर्वस्य धनभागुत्तरोत्तरः ।

Yâjñavalkya thus relates the order of succession to the wealth of one (dying) separated, and not reunited : The wife and the daughters also; both parents ; brothers likewise and their sons ; gentiles, cognates, a pupil and a fellow-student ; on failure of the first among these, the next in order is indeed heir. (Borradaile, May. Chapter IV. Sec. VIII. para 1.)

REMARK.

The question states nothing about the brothers having carried on business separately. If the Shastri is right as to this fact, his conclusions also would stand. But the dining separately alone does not prove that the brothers were divided. If they were

undivided the widow is entitled to residence and maintenance as a charge on the property. B. H. C. R. IV. A. C. J. 73. But see also Introd. § 4. III. 2.

Question 7.—Two brothers have been separate for the last 15 years, but they did not pass a formal deed of separation. One of them has now filed a suit for a share of the land held on Mirâs tenure. The other has answered that there is some debt, and that the property should be divided along with the debt. How should this be decided?

Answer.—When a formal deed of separation is passed in the presence of the kinsmen of the parties concerned, and when each member is put in possession of his share of houses, lands, and other property; the family should be considered as separated. When the members merely live and take their dinner in separate places in the same village, they cannot be considered separated. The property as well as the debt should therefore be equally divided in the case referred to in the question.

Ahmednuggur, 28th April 1856.

Authority.

Vyay. May. *p.* 129, *l.* 2.

See the preceding Question, Authority 1.

Question 8.—The parties are not able to produce a deed of separation. It is, however, proved that the parties separated about 35 years ago, and that the deed of separation was then executed. Can the separation be considered established on other grounds than the production of the deed?

Answer.—As the evidence has proved that the separation took place, and that the parties concerned are in possession of their proper shares, the separation may be

considered established. The production of the deed would have only strengthened the proof.

Ahmednuggur, 2nd July 1847.

AUTHORITIES.

1. Vyav. May. *p.* 129, *l.* 2.
See II. Dig. Chapter IV. Q. 6, Auth. 1.
2. Vyav. May. *p.* 133, *l.* 2.
See II. Dig. Chapter IV. Q. 3.

REMARK.

See particularly Introduction, § 4. III. 1.

APPENDIX.

ON A WOMAN'S SEPARATE PROPERTY.

Translated from the Víramitrodaya of Mitramiśra.

SECTION I.

DEFINITION AND THE VARIOUS KINDS OF STRIDHANA.

Manu's enumeration of six sorts denies a less number, and not a greater.

1. Now, in order to declare the division of 'woman's property,' its definition will be given.

In regard to that Manu says (IX. 194):—

"That which was given to the bride before the (nuptial) fire, or in the marriage procession, and what has been given out of affection; what she has obtained from her brothers, mother, or father, that is called the six-fold property of a woman."

The word six-fold (is used in the above text) in order to deny a smaller number, but not in order to restrict a greater number.

Woman's property described by Yájñavalkya, and Vishṇu.

2. For this reason the Lord of Yogís (Yájñavalkya, uses in the verse II. 144):—

"What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife and the rest, is denominated 'a woman's property;'"

1. Compare Mitákshará Chapter II. Sect. XI. para. 4.

2. Compare Mít. l. c. para. 1. and Mayúkha Chapter IV. Sect. X. para. 2. The numbers appended to the texts of Vishṇu, Nárada, Vásishṭha and Gautama refer to the translations given from these Smṛitis in the Appendix to Dig. vol. I.

the words *"and the rest."* Vishṇu, also, enumerates more than six kinds of 'woman's próperty.' For he says (XVII. 18) :—

" That which has been given to a woman by her father, mother, sons, or brothers, that which she has received before the nuptial fire, that which she receives on supersession, that which has been given to her by her relations, her fee, a gift subsequent, are called 'woman's property.' "

Nárada's enumeration of six sorts of Strídhana to be interpreted like Manu's.

3. Nárada says (XIII. 8) :—

" What was given before the nuptial fire, what was presented in the bridal procession, her husband's donation, and what has been given by her brother, mother, or father, are termed the six-fold property of a woman."

(Here the statement) that (a woman's property) is of six kinds must be explained in the same manner as in the passage of Manu (quoted above, para. 1).

Woman's property is not a technical expre-

4. And the word 'Strídhana,' a woman's property, is (to be understood) according to its etymology (to mean) '*any property owned by a woman.*' But its (meaning) is not restricted by any technical definition. For if (it is) admissible (to take a term in its) etymological sense, it is improper (to explain it by) a technical definition. For this reason the Lord of Yogís (Yájñavalkya) has used the word (ádi), 'and the rest' in order to include property (acquired by) any of the common means of acquisition, inheritance, purchase and the rest (mentioned by Gautama).

An objection to the etymological interpretation of the term Strídhana.

5. But, if this (explanation of the word Strídhana) is (accepted), is it not improper that (certain acquisitions)

---

3. Compare Dáyabhága Chapter IV. Sect. I. para. 4.

4. Compare Mit. Chapter II. Sect. XI. paras. 3 and 2. Gautama's passage may be read at length Mit. Chapter I. paras. 8 and 12. Compare with this para. the discussion in I. Dig. Introd. p. lxv.

5. Compare Mayúkha Chapter IV. Sect. X. para 6. The passage of Kátyáyana, is however wrongly translated by Mr. Borradaile. *Design* (*means*) *intent*, &c. This translation is based on a correction of the Sanskrit text to योगो वञ्चनं दायादानाम् ।

are denied (in the law books) to be Strídhana? For, under that (explanation) no acquisition made by a woman could be declared not to be 'woman's property,' because such a statement would stand in direct contradiction to the (definition admitted). (But) Kátyáyana states, to this effect,—

"Whatever has been given to women under certain conditions or with a certain design, by their father, brother, or their husband, all that is declared not to be 'woman's property.'"

Condition is a restriction such as "Thou must wear these ornaments, or other (property) which have been given to thee, at festivals and the like (occasions) only, not at any other time." That which has been given, after such (a restriction has been made), is said to have been given under conditions. Design (means) the intent to defraud one's coparceners; (*e.g.* if a person say at a division) "This property I have given to my daughter; how can it be divided?"

Continuation of the objection.

6. The same writer (Kátyáyana) declares also that property which has been gained by mechanical arts, or which has been received through affection from her female friends and other (strangers), is not the property of the woman (who obtained it), saying):—

"But that, which has been gained by mechanical arts, or which has been received out of affection from strangers, the husband possesses dominion over that. But the rest is declared to be 'the woman's separate property.'"

If the term 'woman's property' be taken in a technical acceptation, then (presents from friends) cannot be 'the woman's property' because they have been given by other persons than a brother or those others (enumerated above paras. 1 and 3). Therefore property only which is different from such, (*i.e.* that only) which has been given by the father or the other (relations enumerated by

6. Compare May. l. c. para. 7.

Manu) and which is different from gains by mechanical arts and the like (can be called) 'a woman's property.'

Refutation of the objection.

7. If (you argue in this manner for) the technical acceptation of the word 'Strídhana,' I answer :—

(Kátyáyana) does not deny that such (property as conditional gifts, &c.) is (woman's property,) but he denies that she (the woman who acquired it) can divide or otherwise (dispose over) it. Hence he uses in the second verse quoted the expression "*The husband has dominion over it,*" the meaning of which is, that the husband, not the wife, is at liberty to dispose of it.

Special refutation of the first part of the objection.

8. But the denial that (conditional gifts, &c.) are 'woman's property,' made in the first verse (of Kátyáyana) is also reconcilable (with the literal acceptation of the word 'Strídhana,') because the words 'condition' and 'design' are used, and because it is well known that such gifts have no effect. For Manu says (VIII. 165) :—

"When the judge discovers a pledge or sale, gift or acceptance made with a fraudulent design, or in whatever case he discovers a transaction to be conditional, let him annul that entirely."

Explanation of the passage of Manu, declaring a wife to have no property.

9. The passage (of Manu VIII. 416) also :—

"Three persons, a wife, a son, and a slave are declared to have no property exclusively their own, that which they earn, is acquired for the man to whom they belong"—

refers, in the case of a wife, to gains by mechanical arts only, and the like, because it is natural to suppose (both Kátyáyana's and Manu's precepts to have sprung from) one root.

Descriptions of—

10. The definitions of presents given before the nuptial fire and so forth have been given by Kátyáyana :—

---

8. The difference between this and Sir W. Jones' translation of Manu VIII. 165 arises out of a difference of the interpretation of the word उपधि, which Kullúka takes to mean "fraud ;" while Mitramis'ra explains it, para. 5, to mean "condition."

10. Compare Mit. Chapter II. Sect. XI. para. 5; and May. Chapter V. Sect. X. para. 3.

(a.) The present before the nuptial fire.

a. "What is given to women at the time of their marriage, near the nuptial fire, is celebrated by the wise as 'women's property, bestowed before the nuptial fire.'

(b.) The gift presented in the bridal procession.

b. That, again, which a woman receives, while she is conducted from her father's house (to her husband's dwelling), is instanced as the property of a woman, under the name of a gift presented in tne bridal procession.

(c.) A present of affectionate kindred.

c. Whatever has been given to her through affection by her mother-in-law or by her father-in-law or has been offered to her as a token of respect, is denominated an affectionate present.

(d.) A gift subsequent.

d. What has been received by a woman from the family of her husband at a time posterior to her marriage, is called a gift subsequent; and so is that, which is similarly received from the family of her father.

(e.) The fee (S'ulka).

e. Whatever is received by a woman as the value of household utensils, for beasts for burden, for milch-cattle, or for ornaments to decorate herself with, is called her fee (s'ulka).

The affectionate gift (saudáyika.)

f. Whatever a woman receives after marriage in the house of her husband, or while unmarried in the house of her father, from her brother or from her parents, that is called an affectionate gift.

The Kalpataru and other (works) read—

"from her husband,"

(instead of "from her brother.")

But (the meaning of) the words 'a present before the nuptial fire and the rest' is, though in accordance with the etymology, restricted by conventional usage, because they denote such (kinds of) woman's property only (and not any other gifts presented before the fire &c.)*

* The Sanskrit text is evidently corrupt in this passage, and I read तादृशस्त्रीधन एव प्रयोगात् instead of °धनादावप्रयोगात्.

Various definitions of the term 'fee.'

11. The value of household utensils and the like, which is taken (by the parents) from the bridegroom and the rest for the giving of the bride, in the shape of ornaments for the girl, is called her fee (s'ulka). That is the explanation given in the Madanaratna.

But in the Mitákshará (Chapter II. Section XI. para. 6) it is declared, that the price for which a girl is given in marriage, is the 'fee' (s'ulka).

But, in the case of either (explanation) (the property given) to the parents and the rest is clearly intended for the bride, because otherwise she could have no ownership (over such property), and, because for that reason, it would be improper to state that it is 'woman's property.'

But Jímútaváhana writes (in the above s'loka, Dáyabh. Chapter IV. Section III. para. 20) 'Karmiṇám,' 'artisans,' instead of 'Karmaṇám,' 'acts,' and explains it in this manner: 'that bribe which is given by artisans constructing a house or executing other work, to a woman for causing her husband or other (relations) to do work for them, is called her 'fee' (s'ulka). It is the price (of labour); since its purpose is to engage (a labourer).'

Again (the same author) states (*loc. cit.* para. 21)—Or a fee is that which is described by Vyása—

"What (is given) to bring the bride to her husband's house, that is denominated her fee;"

The meaning is that that is called a fee which is given by way of bribe or the like to induce her to go to the house of her husband. Both these kinds of property fall under the ownership of the wife, because they are given to her. Therefore it is easy to understand that they must be called a woman's separate property, just like other kinds of Stridhana.

Definition of a present on supersession.

12. A present on supersession is called that which is given to the first wife on the occasion of (her husband's) taking another wife. Thus Yájñavalkya declares (II. 149):—

"To a woman, whose husband marries a second wife, let him give an equal sum (as a compensation)

11. Compare May. l. c. sub finem.

12. Compare Mit. Chapter II. Sect. XI. para. 34.

for the supersession, provided no separate property have been bestowed on her; but, if any had been assigned, let him allot half."

Property given for maintenance to females.

13. Kátyáyana gives a special (rule declaring), that property may be given to females by their parents and other (relations) for their maintenance and similar (purposes).

"Separate property, excepting immoveables, is to be given to women by their father, mother, husband, brothers, and kindred, according to their means, as far as two thousands."

The meaning is that property other than immoveables and not exceeding two thousand Kárshâpaṇas may be given according to the means (of the relations).

So also Vyása—

"A share of property, amounting to two thousand at the most, may be given to a woman."

Kátyáyana by saying "as far as two thousand," and Vyása by using the words "at the most" show, that even a rich man must not give more to his female relations. It must be known that this restriction refers to gifts repeated in one and the same year. Therefore no wrong is done, if that, what is given for maintenance in different years exceeds the (limit stated above). For the gift is made in order to support (the woman) and two thousand (Kárshápaṇas) are not sufficient (to do that) during her whole life.

Women have in general not free disposition over their separate property.

14. Manu (IX. 199) declares, that women are not free to dispose even over their separate property without the consent of their husbands :

---

13. Compare May. Chapter IV. Sect. X. para. 5. A Kárshápaṇa is a quarter of an áṇa. In the Sanskrit text read स्थावरेतरस्व° instead of स्थावरेतस्व°.

14. The difference of this and Sir W. Jones' translation of this verse rests on the difference of the interpretations given by Mitramis′ra and Kullúka. Compare also May. l. c. para. 8, where, however, Mr. Borradaile has wrongly adopted Sir W. Jones' translation "*or even of the property of her lord without his assent.*" Nilakaṇṭha, also, takes "svakát" &c., to refer to the Strídhana, and not to the husband's property.

"A woman should never expend money, belonging to her family, which is common to (her and) many, nor even her own (separate property) without the consent of her husband."

Nirhára means expenditure.

A woman has free disposal over particular kinds of Strídhana.

15. But women are at liberty to dispose over some kinds of separate property, as Kátyáyana declares, after having premised the definition of the term Saudáyika "the gift of affectionate kindred":—

"The independence of women who have received Saudáyika-property is recognised in regard to that property; for it was given out of kindness for their maintenance."

"The power is declared everywhere which women have at any time over the gifts of their affectionate kindred, both in respect of donation and of sale, according to their pleasure even in the case of immoveables."

But Nárada declares that they have independent power over property given by husbands excepting immoveables—

"What has been given by an affectionate husband to his wife, she may consume as she pleases when he is dead, or give it away, excepting immoveables."

The meaning is that, as regards immoveable property given by the husband, the wife is allowed to use it only by dwelling on it, &c., but not (to alienate it by) gift or sale, or in any other manner.

Some declare that the passage of Kátyáyana—

"The widow of a childless man who remains faithful to her husband, &c.,"

refers likewise, to property other than immoveables only, which may have been given to her by her husband,

---

15. Compare May. l. c. para. 8, but Mr. Borradaile's translation is not exact. Regarding Nárada's text compare May. l. c. para. 9. The passage, "The widow of a childless man," &c. may be read Mit. Chapter II. Sect. I. para. 18.

in order to bring (this passage) into harmony with Nárada. But I have explained this matter at the occasion of the explanation of the text, "A widow and daughters" likewise.

16. Kátyáyana declares also, that males have no power to dispose over any kind of Strídhana, because they are not its owners:—

Males have no power over a woman's separate property.

"Neither the husband nor the son, nor the father nor the brothers have power over a woman's separate property, to take it or to give it away."

"If any of these persons forcibly consume a woman's separate property, he shall be compelled to make it good with interest, and shall also incur a fine."

"If such a person, having obtained her consent amicably, consume that (property), he shall be compelled to pay the principal, when he becomes rich (enough to repay it)."

"But if the husband have a second wife and do not show honour to his first wife, he shall be compelled by force to restore her property, though it may have been given to him out of kindness."

"If suitable food, raiment, and dwelling be withheld from the woman, she may exact her own property and take a share (of the estate) with the co-heirs."

The meaning of the two (last) verses is this; if the husband, after having received the property of his wife, lives with a second wife and shows disrespect to the first, the king shall forcibly compel him to restore the property received; and if the husband does not give to his wife food dress, and dwelling, then those (things) also are to be exacted forcibly by the wife, or property which is sufficient to provide (them.)

---

16. Compare May. l. c. para. 10; and for the last two verses para. 11, where, however, they are attributed to Devala.

A wicked wife deserves no separate property.

17. It must be known that (this rule) also (holds good only) in case the wife is blameless. But a wicked (wife) receives no separate property whatsoever, as the same author declares:—

"A wife who acts unkindly towards her husband, who is shameless, who destroys his effects, and who takes delight in being faithless to his bed, is unworthy of separate property."

The words "is unworthy" mean, that the separate property, which she may have received, shall be forcibly taken from her. A woman who acts unkindly towards her husband, is such a one who is always engaged in committing acts which are against the will of her husband. Another reading (of the above passage) is, 'one who acts against the rules of propriety' (instead of one who is shameless), "one who destroys her husband's effects" (with omission of the word 'and').

A woman's separate property may be used by her husband in times of distress.

18. Devala says:—

"Money given to a woman for her maintenance, her ornaments, her fee (s'ulka), and gains shall be her separate property. She herself exclusively shall enjoy it; her husband has no right to it except in times of distress."

"If he gives it away or consumes it without necessity, he must repay it to the woman with interest."

Vṛiddhi (lit. increase) means, according to the Smṛitichandriká, property given by her father or other (relations) for her maintenance. But the reading in the Madanaratna is 'vṛitti,' 'subsistence,' and (this word is) explained (to mean) property given by her father or

---

17. Compare May. l. c. para. 12.

18. Compare May. l. c. para. 10. "That which is received in honour of Gaurí." At the worship of Gaurí, at the marriage and other ceremonies, the presence of women, whose husbands are living, is required, and such women receive presents of money, ornaments, dresses, &c. for their attendance.

" Argument of the staff and loaves," is the *argumentum a fortiori.*

other (relations) for her subsistence. Gains means money which is received in honour of Gaurí and other (deities) from anybody, whoever he may be.

Without necessity means, without being in distress. Moksha (lit. letting go) means, abandoning, giving away. This (passage) refers to the case, when the separate property is used without permission. But if (a wife) consents, no wrong is done by using (her property) even without (the pressure of) distress.

The words "she herself exclusively" are intended to exclude her children, because the husband is already excluded by the words " her husband has no right to it," and because, through the exclusion of the husband the brothers and other relations, whose connexion with her is more distant than his, are clearly excluded according to the maxim of the staff and the loaves.

Further specifications regarding times of distress.

19. Since the words "except in times of distress" are used, no wrong is done, if (a woman's separate property is consumed against her will) in times of distress. Hence the same author adds :—

" And a woman's property may also be used (by the father) in order to relieve the distress of a son."

From the preceding verses it must be understood that the husband (may do this). The word 'son' is meant to include " the whole family." The distress of such (a person) means the pain caused to such (a person) by the want of food and the like, in order to relieve that. The word 'and' indicates that the husband has a right to give away or to consume his wife's separate property, without her permission, in other difficulties which are caused by the want of money.

An objection against Devala's rule refuted.

20. But, how can that (author Devala) declare, that there exists a right to use or to give away another's property without the owner's permission ? For (such a statement is obviously) futile. But with the owner's permission there is no objection (to using his property) even without (the pressure of) distress.

That will be explained.

---

19. Compare Mit. Chapter II. Sect. XI. para. 32.

20. Compare Mit. l. c. paras. 31 and 32.

(The above rule of Devala is) not faulty, because it appears from special texts that (the husband) possesses ownership over (his wife's property, to such an extent only) that he can expend it for the objects specified.

Hence the Lord of Yogís, (Yájñavalkya,) also says (II. 148) :—

"A husband is not liable to make good, against his will, the property of his wife, taken by him in a famine or for the performance of some religious duty, or during illness, or while under restraint."

For the performance of some religious duty, (*i.e.*) for the performance of necessary, daily or occasional rites.

While under restraint, (*i.e.*) when he has been incarcerated by the king for (non-payment of) a fine or the like.

But Váchaspati (Vivádachintámaṇi, p. 264, Tagore) declares 'sampratirodhaka' (translated by 'while under restraint') to be an adjective, belonging to, 'during an illness,' and to mean 'which prevents (the husband) from following his avocations.' Though it has been stated (in the text of Yájñavalkya), that the husband—

"Need not repay (his wife's separate property) against his will,"

still it must be known that this refers only to the case that he is unable to repay it on account of poverty and the like (reasons). But if he is able (to repay it), he must necessarily do so, even in case the property had been taken in times of famine or similar (misfortunes.) For the passage is proper only, if it is interpreted in this manner, and it is improper to give it this meaning that the repayment depends on his desire, even if he is able to do so.

Since in the text the word 'husband' is used, it must be known that he alone, (and nobody else,) has the right to seize the property of his wife and (he alone) need not repay it, unless he likes.

Property promised to a wife by her husband must be given up by his heirs.

21. The same author (Devala) declares also, that that which had been promised by a husband to his wife, must after his death be paid by his sons or other (heirs);

"Property promised by a husband to his wife must be paid by his sons just as his debts."

Since the expression 'just as his debts' is used, the word 'sons' includes 'grandsons' and 'great-grandsons.' Hence it is understood, that, though sons have by their birth a right to the separate property (of their mother), still they cannot divide it during her lifetime. Thus the separate property of a woman has been described.

SECTION II.

SUCCESSION TO THE SEPARATE PROPERTY OF A WOMAN LEAVING ISSUE.

Manu on the succession to a woman's property.

1. Now the division of such (Strídhana) will be explained. For in regard to that Manu (declares IX. 192):—

"On the death of the mother, let all the uterine brothers and the uterine sisters equally divide the maternal estate."

Since in this passage the word 'and' is used, which has the same force as if a copulative compound had been employed, it is clear that brothers and sisters *together* have a right to their mother's property. The word 'uterine' serves to exclude (brothers and sisters) of the half blood.

Devala says,

"When the mother is dead, her separate property becomes the common property of her sons and daughters. The husband, the mother, a brother or also the father inherit (the property), of a woman deceased without issue."

But it must be understood that brothers and sisters inherit together, because in this (passage the words sons and daughters form) a copulative compound.

---

1. Compare May. Chapter IV. Sect. X. para. 13. A copulative compound, according to the Hindu grammarians, presents the meaning of its several terms at once. See Mit. Chapter II. Sect. III. para. 1, and notes.

Manu's and Devala's rule refers to the gift subsequent and the affectionate gift of a husband only.

2. And this rule (of Manu and Devala) refers to two kinds of Stríḍhana, viz. gifts subsequent and affectionate gifts of the husband. For Manu says again (IX. 195):—

"What she received as a gift subsequent and what she received from her husband out of affection shall be inherited, if she died in his lifetime, by her children."

A gift subsequent, which has been defined above (Sect. I. para. 10) and an affectionate gift of the husband, such separate property of a woman, becomes after the decease, (*i.e.*) the death of the woman, the property of her issue, (*i.e.*) her sons and daughters. In the phrase 'patyau jívati,' (translated above by 'during his lifetime,') the locative case indicates 'contempt,' and its meaning is 'without taking into account the husband, though he may be alive.' This means that he (the husband) has no right to such (property); and because here the common term 'offspring' is used, and (hence) female and male offspring equally are denoted, they (both females and males) inherit together the property of their mother, dividing it equally; and the sisters *do not* inherit first, and on failure of them, the brothers. Thus (this verse ought to be interpreted).

If some sisters are unmarried and some married the former alone share with the brothers.

3. And it must be understood that the word 'sisters' in Manu's text denotes unmarried (sisters).

Bṛihaspati (declares) likewise:—

"A woman's property goes to her children, and the daughter shares with them, provided she be unmarried, but if she be married she receives merely a token of respect."

'To her children' (means) 'to her sons,' because the daughter is mentioned specially. Shares with them (*i.e.*) 'receives a share equal to that of a son.' She receives a 'mere token of respect' means, something (very small) for the sake of honour, but not a share equal to that of a son.

---

2. Compare Mayúkha, loc. cit.

3. Compare Mayúkha, loc. cit. para. 15.

But, if all sisters are married, those whose husbands are alive share equally with the brothers.

4. Kátyáyana declares, that on failure of unmarried daughters, married ones also, whose husbands are living, share equally with their brothers—

"Sisters whose husbands are living, share with their brothers."

Daughters' daughters receive a small present.

5. At the time of division a trifle must be given to the daughters' daughters also.

Manu also (gives a rule) to this effect (IX. 193) :—

"Even to the daughters of those daughters something should be given, as may be fit, from the assets of their maternal grandmother out of kindness."

'As may be fit' (*i. e.*) 'with regard to the usefulness (of the gift) and to their poverty and the like.'

An objection to the last rule refuted.

6. And it ought not to be objected, that there is no reason for giving a present to the daughters' daughters, since they have no right to the property (of their maternal grandmother). For, though daughters have no right to inherit the property of their father, in case their brothers are living, still by virtue of a special text they receive a fourth share; just so it is proper in this case (that granddaughters should receive a trifle by virtue of the special text of Manu). Hence (because they have no right to the property) the words 'out of kindness' have been added. The words 'out of kindness' indicate, also, that in this case, (the gift) is not absolutely necessary. But in the other (case, that of the daughters), (the gift of a fourth share) is necessary, because, (to withhold it) has been declared to be a sin by the text (of Manu IX. 118) :—

"But those who do not wish to give it shall be outcasted."

That is the difference (between the two cases).

The Yautaka goes to the unmarried daughters alone.

7. But the property of a mother, called Yautaka, goes exclusively to her unmarried daughters, not to the sons,

---

4. Compare Mayúkha, loc. cit. para. 15.

5. Compare Mayúkha, loc. cit. para. 16. Read in the text of the Víramitrodaya दौहित्रीभ्यः instead of दौहित्रेभ्यः.

6. Read in the Sanskrit दायानर्हत्वे instead of दायार्हत्वे.

7. Compare Mayk ha, loc. cit. para. 17.

nor to the married daughters. This has been declared by Manu (IX. 131):—

"The Yautaka property of the mother is inherited by her unmarried daughters alone."

Definition of the word Yautaka.

Yautaka, being derived from the root, 'yu,' 'to mix,' 'to join,' means etymologically, 'that which belongs to the two who are joined' (*i.e.*) 'that which is given by the relations to the bride and the bridegroom, at the marriage ceremony when they are sitting on the same seat.' But some (declare 'that property given to the two who are joined in marriage is called Yautaka,) because at the marriage the man and the wife become one flesh.' For the Veda says:—

"Bone to bone, flesh to flesh, skin to skin;"

and the meaning is, that the bones and other parts of the husband and wife become one. Again others explain (the origin of the term) by means of the union (of the husband and wife), which takes place at the marriage according to the meaning of (this) sacred formula:—

"Thy heart shall become mine, my heart shall become thine."

In the Nighaṇṭu (it is said):—

"That which belongs to the two who are joined is called Yautaka."

The word is also pronounced Yautuka, since the Kosha states,

"It is called Yautaka and Yautuka."

Another explanation of the word by Devasvámin rejected.

8. Devasvámin says—

"Yautaka is the property of the wife, which she received in the house of her father, such property being distinct from that which she received in the house of her husband. For as the Dhátupáṭha states that the root 'Yu' means both 'to join' and 'to separate,' Yuta means also 'separation,' and it is used in this sense (in the Nyáyas'ástra) where the term Yutasiddha occurs."

That is wrong. For (Devasvámin's explanation is) nothing but a fanciful fiction, since, there being no decisive reason to the contrary, he might (according to his etymology) have defined Yautaka as the property received in the house of the husband, such property being distinct from that received in the house of the father.

9. If there are several unmarried daughters they divide (such property) equally, because no difference (in the shares) is mentioned, (and this is done) according to the maxim—

If there are several unmarried daughters they share equally.

" Equality shall prevail, if (no other rule) has been mentioned."

10. Property of the mother which is different from the three kinds (mentioned above), goes to her daughters, and in the first instance to those of them that are unmarried. On failure of them (it goes) to the married daughters, and amongst them first to those that are poor and next to those that are rich and whose husbands are living, and on failure of them to the widowed ones.

Strídhana, other than Anvádheya, Prítidatta, and Yautaka, goes to the daughters unmarried, and unprovided.

Gautama states to this effect (XXVIII. 21):—

" A woman's property goes to her daughters, unmarried or unprovided."

Unprovided means 'childless,' 'poor,' 'unlucky,' or 'widowed,' according to Aparárka and the author of the Kalpataru. Vijñánes'vara and the rest allow only the first two explanations (of the term).

11. The Smritichandriká and the Madanaratna declare, that, though in this (passage) the general term 'a woman's property' has been employed, it refers to such (separate property) only, that does not fall under the three (categories above mentioned).

The above rule agrees with the opinion of the Smritichandriká and Madanaratna.

12. But Jímútaváhana (Dáyabhága, Chapter IV. Section II. para. 13) and Smártabhaṭṭáchárya have declared that, the passage of Gautama, above quoted, the passage of Nárada (XIII. 2) :—

According to Jímútaváhana and Smárta-bhaṭṭa the text of Gautama, and other passages quoted, para. 10, refer to the Yautaka only.

---

10. Compare Mayúkha, loc. cit. para. 18.

12. Read in the Sanskrit text of Nárada दुहितरोभावे instead of दुहितृरभावे.

"The daughters (shall divide) their mother's (wealth); on failure of them, her (male) offspring;"

the passage of Kátyáyana—

"But on failure of daughters the inheritance belongs to the son;"

the passage of Yájñavalkya (II. 118):—

"Daughters share the residue of their mother's property after payment of her debts, and the (male) issue succeeds in their default;"

and other texts of the Smṛiti, which declare the necessity of the daughter's inheriting their mother's property, refer, in conformity with the text of Manu (IX. 131):—

"The Yautaka is the share of the unmarried daughters;"

and with the text of Vásishṭha (XIV. 23):—

"Let the females share the nuptial presents of their mother;"

to the Yautaka only, because (otherwise) they (would) contradict the above (para. 1) quoted text of Manu (IX. 192).

Explanations of the term Páriṇayya, 'nuptial presents.'

13. Those two (authors Dáyabhága, loc. cit. para. 14) explain the word páriṇayya (nuptial present) to denote that which has been received at the marriage (that is to say), the Yautaka. In the Kalpataru and the Vivádachintámani the reading páriṇayya is given, and the word explained to denote the paraphernalia of a woman, such as her mirror, comb, and the like.

According to Vijñánes'vara, all Stridhana devolves according to the text of Gautama, quoted para. 10.

14. But Vijñánes'vara declares that, a woman's property, of whatever description it may be, goes first, though sons may be living, to the daughters, daughters' daughters, and to the daughters' sons, and on failure of these (heirs) to the sons.

But the (descent of) a childless woman's separate property will be declared (in the sequel).

---

13. See Vivádachintámani, translated by P. K. Tagore, p. 269. Mit. Chapter. 14 See. II. Sect. XI. paras. 12 and 13.

Full explanation of Vijñánes'vara's opinion.

15. In the passage of Yájñavalkya (II. 118) :—

" Daughters (share) the residue," &c.;

not the daughters, alone, but by the words—

"On failure of them the issue ;"

the daughter's daughter and the daughter's son also are intended, according to the text of Nárada (XIII. 2) :—

" The daughters (share) their mother's (wealth); on failure of daughters their offspring."

In the latter passage, the word tad (crude form the 3rd personal pronoun), which is contained in the word tadanvaya (their offspring), refers to the daughters, who are mentioned immediately before, and not to the mother, (as Jímútaváhana thinks).

Further, the offspring of a daughter may be female or male. Amongst them also the daughter's daughter (inherits) first, and next the daughter's son. For in the text of Yájñavalkya (II. 146) also, which will be quoted below, (Sect. III. para. 2)—

" If she have offspring, the (daughter's) daughters take it)."

The daughter's daughters are intended because (otherwise the author) would be guilty of redundancy, as he has already mentioned the daughter's (right to inheritance) explicitly in the text (II. 118):—

" The daughter's share," &c.

The right of the daughter's son is indicated by the (use of the) general term " the daughter's offspring."

But the right of the sons follows from the abridged conjunctive compound used in this text of Yájñavalkya (II. 118) :—

" Let sons divide equally the effects and the debts after (the demise of) their two parents ;"

and that has been already explained above.

---

15. See Mit. Chapter II. Sect. XI. paras. 12 and 13.

Compare also Mit. Chapter. I. Sect. III. para. 1. In the Sanskrit text read तेनैवोक्तत्वात्पुनरुक्तयापत्तेः instead of तेनैवोक्तत्वात्पुत्रत्वात्पुनरु°.

A rectification of the explanation of Yajn. II. 118 b.

16. But since in the passage (Yájn. II. 118) :—

" On failure of daughters the issue,"

the word 'issue,' may be fitly construed with the word 'mother' (that stands in the beginning of the half verse) and in the genitive case, and since the daughters are mentioned separately, the sons and the rest alone are intended (by that word), and this is no superfluous repetition, because (here) the sons are declared to inherit on failure of daughters (while in the beginning of the verse their right was mentioned generally only).

Vijñánes'vara's explanation of Manu IX. 192, quoted Section II. para. 1.

17. But the meaning of the text of Manu (IX. 192) :—

" On the death of the mother, let all the uterine brothers and the uterine sisters equally divide the maternal estate ;"

is this ; 'all the uterine brothers and all the uterine sisters shall divide the maternal estate equally, (each class) *at that time when their rights come into force*. But the meaning is not, that both (sisters and brothers) shall jointly divide the estate) in equal shares. For, since the words (brothers and sisters) do not form a copulative compound or an abridged copulative compound, they cannot be understood to present the meaning of their several terms at once. Besides the word 'and' (which connects the two terms) may be understood to connect them exclusively in their capacity as sharers of the property (without reference to time). Just in the same manner, if one says "Devadatta ploughs and also Yajñadatta," it is not (necessarily) indicated thereby, that there is a complete conjunction

---

16. Compare Mit. Chapter I. Sect. III. para. 12.

17. Compare Mit. Chapter. II. Sect. XI. paras. 20 and 21.

Here, and in the sequel, the word 'ekas'esha,' lit. '(the omission of some and) the retention of one term,' has been translated by " an abridged copulative compound." It ought to be mentioned that the Hindu grammarians do not consider the Ekas'eshas, viz. terms like pitarau, the two fathers, instead of mother and father, bhrátaraḥ 'brothers' for 'sisters and brothers' to be abridged copulative compounds. But the latter translation will be easier understood by those who are unacquainted with native grammar, and it describes the real origin of these forms more correctly than the Hindu term. See also Mit. loc. cit. note.

(between the two persons not only as to the performance of the act but also) as to time. Though the right of both (brothers and sisters) to the maternal estate is established by another passage, the object of this text is to forbid by (the use of the word) equally, a division made unequal by means of preferential shares given to the eldest and the like.

The daughter of a Bráhmaní wife takes the estate of a wife of a lower caste.

18. The word 'uterine' is used in order to prevent half-brothers and half-sisters (from obtaining shares). To the same end Manu has declared, that a step-daughter born by a wife of the highest class, on failure of her offspring, takes the property of a stepmother of a lower caste (saying, IX. 198):—

"The wealth of a woman which has been in any manner given to her by her father, let the Bráhmaṇí daughter (of her husband) take it, or let it belong to her offspring."

Here (the author) intends a childless wife of the Kshatriyá or any lower caste; and the words 'a Bráhmaṇí' (daughter) includes any superior class. And this (text of Manu) is an exception to (the rule laid down in the verse, Yájñavalkya, II. 146):—

"The property of a childless woman goes to her husband," &c.

Hence the daughter of a Kshatriyá wife takes the property of a childless Vais'yá, and the daughter of a Vais'yá takes the property of a childless S'údrá. On failure of such (step-daughters) their offspring take it; and on failure of the latter, (the text of Yájñavalkya II. 146)—

"The property of a childless woman," &c.

comes into force.

The daughters, therefore, inherit before the sons.

19. Therefore they declare that the daughters and the rest have a right, in the first instance, to the property of females leaving issue, and after them the sons and the rest.

Jímútaváhana's explanation of Manu IX. 192, identical with that given above, para. 1.

20. Jímútaváhana (Dáyabhága, Chapter IV. Section II. para. 2 sqq.) gives the following comment on this (passage):—

18. Compare Mit. loc. cit. para. 22.

a. (Dáy. l. c. paras. 2—6.) It is proper that the uterine brothers and sisters should divide and inherit *together.* For, though in the texts of Manu, of Bṛihaspati, and of S'ankha and Likhita (the two terms 'brothers' and 'sisters' do) not (form)a copulative compound, still the same meaning may be derived from the word 'and' (which unites the two terms) and denotes 'cumulation.' Moreover the word 'and' is proper to denote conjunction in time, in these (passages) also, because in the passage of Devala (Dáyabhága, loc. cit. para. 6):—

"A woman's property is common to her sons and unmarried daughters," &c.

the copulative compound has been employed.

b. (Dáy. l. c. para. 7.) Besides, if the daughters alone were entitled to the whole property of their mother, a special text, regarding the Yautaka would be meaningless. And it is not proper to say, that this (latter text) is intended to exclude married daughters by the employment of the term (kumárí) 'unmarried daughter;' because their exclusion from every kind of Strídhana has been declared in the texts of Gautama (XXVIII. 21) and the rest, and because on failure of unmarried daughters, the married ones and the rest must be allowed to have a right to this (kind of property, the Yautaka) also. Therefore the decision is, that sons and daughters* are intended by Manu and the rest to have an equal right to property received by a woman before the nuptial fire and the like, and that daughters alone are intended to have a right to the Yautaka.

c. But the gift subsequent and the gift of the affectionate husband, which alone are mentioned in the second text of Manu (IX. 195), include the gift received before the nuptial fire and the rest, because otherwise it would be useless that (the author) makes a fresh beginning in respect of the Yautaka.

Raghunandana and others agree with Jímútaváhana.

21. The opinions of the author of the Dáyatattva and others agree with this view of Jímútaváhana.

* In the Sanskrit text read पुत्रपुत्र्योः instead of पुत्रपत्न्योः,

Mitramis'ra's opinion, containing the refutation of Jímútaváhana's view, given in para. 20, c. and b.

22. My view on this (subject) is as follows :—
Since there is no proof, that the mention of the gift subsequent and the rest includes (as Jímútaváhana asserts) (other kinds of Strídhana), the daughters in the first instance, have a right to all other property of their mother, except those two sorts (the gift subsequent and the affectionate gift of the husband); and after them the sons have a right to it. But the special text regarding the Yautaka is intended to exclude the married daughters. If (you object to this), that (the exclusion of married daughters holds good) likewise in (the case of) other (sorts of Strídhana), (then I grant) that that is true. But (in regard of the latter the exclusion) is not absolute, while in the case of the Yautaka it is absolute. Therefore the opinion of the author of the Smritichandriká and of the rest is, that the Yautaka goes, on failure of daughters, to the husband or others (*i.e.* the woman's parents) according to the diversity of the marriage rites, but not to the married daughters.

Exposition of Vijñánes'vara's opinion on the bearing of Manu IX. 192, and refuation of Jímútavahaná, para. 20 a.

23. But the view of Vijñánes'varáchárya is the following. In general (the texts of the Smritis) declare that the daughters shall take all their mother's separate property. (Now a rule) ought to be restricted (in its effects) by virtue of a text only, that admits of no other explanation, (*i.e.* of no explanation that brings it into harmony with the first). (But) the texts of Manu and the rest do admit of another explanation (as has been shown above, para. 17,) and do not (necessarily) import the equal right of the sons and daughters, because they (may be interpreted to) indicate merely the general right of sons.

Nor does the word 'and' or the copulative compound (used by Devala) indicate the equality (of the son's and daughter's rights), because their use is justified also if they are interpreted to connect the (two classes of persons) in their quality as sharers merely (see above, para. 7). Otherwise (if this explanation were not admissible) the successive right of a mother and a father (to the estate of their son) which is allowed in all the (law) books, would be impossible, as (in the passage of Yájñavalkya, II. 136) :—

23. Regarding Yájñ. II. 136, compare Mit. Chapter II. Sect. III. para. 2 sqq.

"The wife, and the daughters, also both parents," &c.;

an abridged copulative compound is used; and (in the passage of Kátyáyana)—

"That is desired for the mother and the father," &c.,

a copulative compound.

An objection refuted.

24. (If) it be objected that in the latter (case) those (copulative compounds) are proper (to be explained) as expressing merely the co-ordination of the verbal construction in conformity with the passages of Vishṇu (XVII. 6, 7,) and others, but that the sequence of the persons expressed by the words, though not corresponding (to the co-ordination of the verbal construction) is (for this reason only) compatible with (the use of the copulative compound), then (I answer)—

In this (case of the sons and daughters) also let it be proper to (interpret) the copulative compounds, the word 'and' &c. as expressing merely the co-ordination of the verbal construction, since the sequence of the persons expressed by the words, which may be learnt from the texts of Yájñavalkya and of Kátyáyana:—

"After them the (male) issue."

"On failure of daughters the inheritance goes to the sons;"

does not correspond (with the co-ordination of the verbal construction). But it is impossible to interpret those (last passages) in conformity with the former and to consider them to teach something else.

---

24. Vishṇu, loc. cit., mentions the rights of the mother and of the father in two separate Sútras. This circumstance might be used by a pertinacious opponent in order to invalidate the objection advanced, para. 23 *sub finem*. For it might be asserted that this text of Vishṇu was the reason for allowing the abridged compound pitarau, the 'two parents,' to denote the successive right of the mother and the father. In order to remove this objection Mitramis'ra adduces two texts of Yájñavalkya and Kátyáyana, where the successive right of sisters and brothers is likewise expressly mentioned.

(For) if the right (of sons and daughters) to inherit together, were established, then it would be right to limit their interpretation, and if the limitation were proved to be right, then the equal right (of sons and daughters) would follow.

Thus there arises a reasoning in a circle.

Under Vijñánes'vara's explanation Manu's text regarding the gift subsequent (IX. 192) is not void of meaning.

25. But, if you object, that (on the adoption of this interpretation) (Manu's) special text regarding the gift subsequent and (the affectionate gift of the husband) becomes devoid of meaning, then I deny that. For it has a meaning, if interpreted in conformity with the view of the author of the Chandriká (above, para. 22,) and the rest regarding the Yautaka. For all the texts will be full of meaning, if, supposing the mention of the Anvádheya to include (all other kinds of Strídhana) and supposing that (text regarding the gift subsequent to declare the general right of the issue to inherit), the text

" After the death of the mother let the uterine brothers," &c.

and similar ones be taken to declare the equality of the shares and the like. Therefore everything is in order.

Vidyáraṇya gives no decision on the disputed interpretation.

26. But the illustrious Vidyáraṇya has given both views, according to the Smritichandriká and the Mitákshará, without giving a decision (in favour of the one or the other).

The right of daughter's daughters to inherit.

27. But the right of daughter's daughters and daughter's sons (to inherit) before the sons and the rest, is allowed unanimously by the authors of the Mitákshará, Chandriká and Madanaratna, as well as the illustrious Vidyáraṇya.

Jímútaváhana makes the sons inherit immediately after the daughters.

28. *a*. But Jímútaváhana, (Dáyabhága, Chapter IV. Sect. II. paras. 17—19) and the author of the Dáyatattva (assert) that the sons inherit immediately after the daughters, and not after the daughter's daughters and the rest. For (according to him) it is not possible to construe in the passage of Nárada,

" On failure of daughters the issue (of) that inherits,"

the word 'issue' which designates the issue in the shape of sons and the rest, with (the word) daughter.

For the word 'daughter' which signifies a particular sort of progeny, cannot be construed with (the word anvaya which) also (denotes) progeny, since (both have the) same (import) and (therefore do) not (require each other as) correlatives (but a word meaning parent). Nor (can it be said that) the word tat (that) (in the compound tadanvaya 'issue of that') is required as a correlative (of the word anvaya) because it denotes them (the daughters) in their quality as daughters only.

b. Dáy. l. cit. para. 20. Besides, since the word "daughter" in the text of Yájñavalkya (II. 118) standing in the nominative case and (the pronoun) 'of them' in the ablative case, cannot be construed with the term 'issue' which requires the genitive case, (the term 'issue') must be connected with the term 'mother' (which stands in the genitive case), though (the latter) is separated by the intervention of other words. Since (the text of Nárada, quoted para. 28 *a*) must have the same meaning as that (of Yájñavalkya), (the term tadanvaya 'issue of that') in the former (passage) also must denote the progeny of the mother, the sons and the rest, and not the offspring of the daughters.

c. Dáy. l. cit. 21. Moreover conformably with the passage of Baudháyana,

> "Male issue of the body being left, the property goes to them,"

it is proper that the son who is the immediate issue of the body (of his mother) should inherit (her property) and not the daughter's son, who is the mediate issue only of his mother's mother's body.

29. That is foolish.

---

28 *b*. Read in the Sanskrit text अन्वयपदेनानन्वयात् instead of देनान्वयत्.

28 *c*. The reading given by all our MSS. of Baudháyana is सत्स्वन्येषु "Though other (relations) be alive, the property goes to them (the sons.)"

Refutation of Jímútaváhana's opinions quoted in the preceding para.

a. If a word signifying 'issue' could not be construed with another (word denoting) issue, then this construction could likewise not take place in the case of the word 'son' and the like. (If you answer, that in the latter case) there is no objection to construing (one word denoting 'issue' with (another), because its connexion with that issue is certain, then (I answer that the case of the passage of Nárada is) just the same.

Were it otherwise, a construction like 'the daughter's sons' would not be admissible. Therefore this (first objection of Jímútaváhana) is (caused) merely (by) ignorance of the theory of the (construction) of words.

Refutation of para. 28 b.

b. Though in the text of Yájñavalkya, the mother's issue, (*i.e.*) the sons and the rest, have been mentioned, still (that text) makes a repeated mention of the sons, whose right to inherit had been declared already by the passage II. 118,—

"Let sons divide equally," &c.;

in order to show that the conditions (of this right are) the payment of the debts and the absence of daughters. And (this meaning) remains uncontradicted even if (the sons inherit) after the daughters' sons.

---

29 *a.* Read in the Sanskrit text जन्यान्तरेणानन्वये.

The argument is awkwardly arranged. Mitramis'ra means to say, if Jímúta were right, phrases like 'the daughter's son' would be impossible. Then he makes the imaginary opponent answer, that there is a difference between this case and the construction of Nárada's text, since in the phrase 'the daughter's son' the grammatical construction and the proximity of the words make it necessary to connect the two words, while the construction is looser in Nárada's text. To this Mitramis'ra rejoins, that the necessity of construing the word 'daughters' with issue is just as urgent in the latter case, his reason, which he does not state explicitly, probably being, that the word tad in tadanvaya must be referred to the nearest term. The whole discussion is a specimen of the wretched quibbles, with which the Shastris amuse themselves in their Sabhás.

28 *b.* Mitramis'ra agrees with Jímútaváhana in referring the words 'the (male) issue' to the sons. But he holds, that the text does not teach their right to inherit immediately after the daughters.

Refutation of para. 28 c.

c. But the text of Baudháyana,

"Issue of the body being alive," &c.,

teaches only that male progeny, because descended from a common mother, (no matter whether in the first or second degree,) inherit her property, and, since the word 'angaja,' 'born from the body,' has the same meaning as (apatya) 'progeny,' it teaches also the right of both sons and daughters. It ought, therefore, not to be interpreted as teaching a nearness, which is contradictory to (the import of) other texts. Thus (this reasoning of Jímútaváhana) comes to nothing.

SECTION III.

SUCCESSION TO A CHILDLESS WOMAN'S PROPERTY.

A general precept of Yáj-ñavalkya.

1. In case of failure of progeny the Lord of Yogís (Yájñavalkya) says (II. 145) :—

"Her kinsmen take it, if she die without issue."

'Without issue' means 'without leaving either daughters or any other descendants down to great-grandsons;' 'if she pass away' means 'if she die;' her kinsmen, viz. those persons that are mentioned in the following verse.

The succession is different according to the diversity of the marriage rites.

2. The same (author) mentions different heirs according to the diversity of the marriage rites (II. 146) :—

'The property of a childless woman, married in the form denominated Bráhma or in any of the four (unblamed modes of marriage) and also (in the

---

1. Compare Mit. Chapt. II. Sect. XI. paras. 8 and 9.

2. Compare Mit. loc. cit. paras. 10 and 11.

But Mitramis'ra's explanation is different from Vijñánes'vara, as he desires to make the passage agree with Manu's text.—An atadguṇa-saṁvijñána bahuvríhi is a relative compound, where the thing only, and not the qualities by which it is characterised, are to be taken in connexion with an action, *e.g.* in the phrase, 'Bring him who possesses the spotted cows.' The person only who is indicated by the relative sentence is to be brought and not his cows, the attribute by which he is described.

Gándharva rite), goes to her husband; but if she leaves progeny, it will go to her (daughter's) daughters ; and, in other forms of marriage, it goes to her father ("and mother)."

'In the four (rites)' means 'in those denominated Bráhma, Daiva, A'rsha, and Prájápatya.' Since the words 'api,' 'also' (is placed in the text), the Gándharva rite is likewise included. Or, the compound (Bráhmádichaturshu) being one of the class at atadguṇasaṁvijñána bahuvríhi, the four first rites after the Bráhma marriage (must be understood). (Interpreted) in this manner (the text of Yájñavalkya agrees perfectly with that of Manu (IX. 196)—

"It is ordained, that the property of a woman married by the ceremonies called Bráhma, Daiva, A'rsha, Gándharva, or Prájápatya, shall go to her husband, if she die without issue."

Explanation of the two passages.

3. The property of a childless wife married by the Bráhma or any other (of the aforementioned) rites goes to her husband, and on failure of him, to the husband's nearest relations.

For, as it is by the husband that the nearness to the possessor (the wife) is barred, the nearness to the husband must be made the principal consideration.

But if she had been married by (one of) the remaining rites, the A'sura and the rest, (the property) goes to the parents, viz. to the mother and the father, since (the term pitṛi) is an abridged copulative compound.

In this case it goes first to the mother and after her to the father, according to the principle laid down in the (section on the succession of the) *Parents* (to their childless son), and because there is no text enjoining the contrary.

Hence Manu has in his text (IX. 197)—

"But her wealth given on the marriage called A'sura, or on either of the (two) others, is ordained,

---

3. The principle laid down in the (section on the succession of the) *Parents*, see Mit. Chapt. II. Sect. III. para. 1, sqq.

on her death with issue, to become the property of her mother and father,"

placed first the word mother in the copulative compound máté-pitṛi, and thereby indicated the precedence of the mother.

Succession to the property of an unmarried female.

4. Further, since it has been declared, that the mother inherits (in the first instance) the property of a (pre-deceased) unmarried daughter, and on failure of her the father, it is proper that the same (order) should be observed here.

For thus Baudháyana says :—

"The wealth of a deceased damsel, let the uterine brethren themselves take. On failure of them it shall belong to the mother, or, if she be dead, to the father."

Succession on failure of parents.

5. On failure of the two parents (the property) goes to their nearest relations.

Further explanation of Yájñavalkya, II. 146.

6. In the case of any of the above-mentioned marriage rites, if she have progeny, (*i. e.*) if she have issue, her property goes to her (daughters') daughters. And it has been stated above (Sect. II. para. 15) that the term daughters indicates here the daughters' daughters. There it has also been said, that according to the text of Gautama, they inherit in the order of unmarried ones, &c., and that when the daughters divide their mothers' property, a small portion should be given to the daughters' daughters.

And the daughters' daughters being issue of different mothers inherit their grandmother's property in unequal shares according to their mothers, just as grandsons (inherit) according to their fathers. For Gautama says (XXVIII. 14)—

"Or let the shares be adjusted among each class of sons according to their mothers."

---

4. Compare Mit. Chapt. II. Sect. XI. para. 30.

5. "And the daughter's daughters, being issue," &c., compare Mit. Chapt. II. Sect. XI. para 16.—" Just as grandsons according to their fathers," read in the Sanskrit text पितृद्वारेणेव instead of रेणैव.

6A Regarding Jímútavâhana's opinion, see Mr. Colebrooke's note to Dáyabhága, 4.

Jímútaváhana's exposition of Manu, IX. 196.

6 A. But Jímútaváhana (Dáyabhága, Chapter IV. Sect. III. para. 4), states, that this text (Manu IX. 196) declares the disposal of that wealth which had been received during (the celebration of) the Bráhma and the other (above-mentioned) marriage rites, but not that of the entire property of a woman, who was married according to (one of) those (rites).

For (the assumption that) the term 'in the Bráhma and other marriage rites' is to be connected with (the words) 'whatever wealth,' that this connexion is one of (time) present (and hence the locative) metaphorically expresses time, is preferable to (the view that) (the term 'in the marriage rites') refers to the woman who has been married according to them, that the connexion is based on the past marriage act (and that hence the locative case) metaphorically indicates (the woman married).

The author of the Dáyatattva agrees with Jímúta.

7. The author of the Dáyatattva following (Jímútaváhana) (gives) the same (explanation).

Refutation of Jímútaváhana's view.

8. That is not clever. For, as in the preceding text, it had been stated in general terms, that the kinsmen take the property of a wife deceased without leaving issue, and as hence arises the desire to know, of what description the childless widow (must be) and who the kinsmen are, it is proper that the terms "in the Bráhma rite," &c. should qualify these words. And the principle of interpretation, based on the connexion of present and past time, is likewise of no use.

For, in the case of either (of the proposed interpretations) (the acts of giving the property and of marrying the woman are) equally past at the time when the property is divided, and hence the co-ordination in time of the acquisition of the wealth and of the marriage rite proves nothing. Besides it is of greater importance (to indicate) the relation of wifehood which arises through the marriage rite (than to indicate the time).

Property received after marriage from the parents goes to the brothers.

9. But what she obtained from her parents after her marriage, according to whatever rite (it may have been celebrated), that goes to her brothers. In regard to this Kátyáyana says—

"And whatever immoveable property has been given by the parents to their daughter, that goes, in case she dies without issue, always to her brothers."

But Vis'varúpa and Jímútaváhana (Dáyabhága Chapter IV. Sect. III. paras. 12—15) declare that that property goes to her brothers, which had been given to her by her parents, whilst she was unmarried, because that which she obtained after her marriage is 'a gift subsequent,' and because that which she received at the marriage ceremony goes according to the diversity of marriage rites to her husband or to her mother and father.

That is wrong. For (the text of Kátyáyana) refers to immoveable property, and hence is not contradictory (to the other ones). And it is wrong to contend (as Jímútaváhana does) that the term 'immoveables' includes the moveables according to the maxim of the staff and loaves (the argumentum a fortiori). For that maxim does not apply to an exception.

The s'ulka goes to the brothers.

10. But the fee (s'ulka) goes to the uterine brothers. For Gautama declares (XXVIII. 22)—

"The sister's fee belongs to her uterine brothers."

On failure of uterine brothers (it goes) to the mother. For the same author says—

"After (them), it goes to the mother. Some declare, that (the mother inherits) first."

(The latter is) the view of others (not that of Gautama).

Property given by the relations goes to them.

11. Property given (to the wife) by her kinsmen, belongs, if she die without issue, first to her kinsmen; on failure of them (it goes) to the husband, according to this text of Kátyáyana—

"What was given by the kinsmen goes to them, and on failure of them to the husband."

Brihaspati enumerates some remoter heirs to a childless woman's property.

12. Regarding the case, that none of the above mentioned heirs to a childless woman's property be living, Brihaspati says—

10. Mit. Chapter II. Section XI. para. 14.

11. Compare May. Chapter IV. Sect. XI. para. 31, and the note.

12. Compare May. loc. cit. para. 30.

"The mother's sister, the maternal uncle's wife, the paternal uncle's wife, the father's sister, the mother-in-law, and the wife of an elder brother are pronounced to be similar to mothers. If they leave no legitimate offspring of the body, no step-son, nor a daughter's son, nor their son, then the sister's son and the rest shall take their property."

Here the term 'legitimate issue of the body' must be understood to include sons and daughters, because those two bar (the rights of) all other (heirs).

Stepson and his son inherit before the sister's son, etc.

13. And the order in which they bar (the rights) has been declared above (Sect. II. para. 27.) and the term 'son' denotes the son of a co-wife, by virtue of this text of Manu (IX. 183):—

"If among all wives of the same husband, one bring forth a male child, Manu has declared them all, by means of that son, to be mothers of male issue."

But the word 'son' is not to be construed with the word legitimate (issue) of the body. For (in that case), it would be destitute of meaning. Besides, (under that interpretation), a sister's son and the rest would be entitled to inherit, though a stepson might be living, and that is opposed to immemorial custom.

Recapitulation of heirs in failure of the daughter's son.

14. And thus on failure of the daughter's son, the legitimate son of the body and the rest (viz. his son and grandson) inherit, on failure of them the stepson.

The term "their son" includes the sons of the legitimate son of the body and of the stepson, though the words 'aurasa' and 'suta' are separated from the term 'their son,' by (the intervening term 'the daughter's son'); and it does not refer to the immediately preceding 'daughter's son,' because the daughter's son is excluded from offering funeral oblations (to his great-grandmother).

And thus on failure of (all heirs down to) the daughter's son, first the legitimate son of the body inherits, after him his sons and grandsons.

---

13. Add in the Sanskrit text the word ग्रहणम् after सपत्नीपुत्रस्य.

For, since according to the text,—

"Sons and grandsons must pay the debts (of their ancestors),"

they are obliged to pay the debts, and since, besides, they are obliged to offer funeral oblations, it is proper that they should take the inheritance.

On failure of these, (the inheritance devolves) on the stepson, his sons and grandsons, because, under such circumstances, these offer the funeral oblations and pay the debts, and because it has been ordained in this manner in the above text of Manu (IX. 183).

The sister's son and the rest inherit on failure of the stepson's grandson.

15. Then, on failure of these, though Sapiṇḍas, such as a father-in-law, may be living, the sister's son and the rest have a right to inherit, according to the scale of their nearness mentioned in the text of Bṛihaspati, the property of their mother's sister and the rest, by virtue of that special text (of Bṛihaspati) which cannot have any other application.

Females are excluded.

16. But a daughter-in-law and the other (female relations) receive merely food and raiment, because their nearness (to her mother-in-law) as a Sapiṇḍa relation has no force, it being opposed by special texts. For the Veda (declares)—

"Therefore women have no right to use sacred texts or to a share,"

and Manu gives, in conformity with that (passage,) the (following) text—

"Women have no right to use the sacred texts and no right to a share, they are (foul like) falsehood. That is a settled rule."

---

16. The words attributed here to Manu are apparently intended as a quotation from Manu, IX. 18. But there, in our text, the most important word 'adâyâh,' 'have no right to a share,' is not to be found. The edited text, which is supported by the authority of Kullûkabhaṭṭa, reads 'amantrâh.' It is not likely, that so late a writer as Mitramis'ra should have had before him a redaction of Manu different from our own. I am, therefore, inclined to assume that the difference in the reading is owing to a lapsus memoriæ on the part of Mitramis'ra, who no doubt quoted here, as usually, from memory.

Besides the established doctrine of the Southern lawyers such as the author of the Smṛitichandriká, and of all the Eastern lawyers, of Jímútaváhana and the rest, is, that those women only have a right to inherit, whose claim has been particularly mentioned in special texts such as—

"The wife, and the daughters likewise," &c.,

but that (all) others are prohibited from receiving shares by the (above-quoted) texts of the Veda and of Manu.

Thus the division of a woman's separate property (has been explained).

NOTE ON SOME CASES UPON THE SUBJECT OF STRI'DHANA.

The learned translator, Baboo Prossonno Komar Tagore, of the Vivádachintámaṇi, in a synopsis deduced from that and other works, says (Section XII.) " any property which a woman inherits is her strídhana, that is, peculiar property. Hence any property of her husband which she inherits shall on her death be received by the heirs of her peculiar property. But according to the Smṛitisára such property cannot be strídhana. Hence the heirs of her husband shall receive it."

In Section XI. he says " a widow inheriting her husband's property can enjoy it for life, but cannot sell or make a gift of it at her pleasure." In a case at Calcutta Weekly Reporter III., Civil Rulings 105, these passages are referred to, rightly, as limiting the widow's power of disposition, but what is said in the same case of the doctrines of the Mitákshará as to the constituents of " strídhana" is partly founded on a mistake, and affords no useful guidance. It is said that " property devolving by inheritance on a woman is not her strídhana in the sense in which that word is used by Manu." The question was rather " what is the extent of a widow's power over the different parts of the strídhana according to their sources, under the law of the Mitákshará ? Further on, an apparent contradiction is relied on as impairing the force of the explanation in Mitákshará, Chapter II., Section XI., but the contradictory passage quoted as from the Mitákshará in Strange II. 253 is really taken from Colebrooke's translation of the Dáyabhága, and is S'ríkṛishṇa's Summary of the doctrine of Jimútaváhana (see Colebrooke's Dáyabhága, page 224, W. Stokes' Hindu Law Books, page 352), which differs entirely from that of the Mitákshará on this point. The want of cases resting on Vijñánes'vará's interpretation of " strídhana" is easily accounted for, by the circumstance that it is only rarely that any practical difference arises, whether his interpretation or that of the Bengal school be adopted. In a subsequent case, at page 141 of the volume above-quoted, it is said that " the text clearly confines ' strídhana' to be some sort of special separate property,"

which, as has been shown, is directly the reverse of Vijñánes'vará's meaning. If any doubt be felt on this point, it may be removed by a reference to Colebrooke's notes on paras. 2 and 3 of Section XI., which show conclusively that he understood the text, and that the Native commentator Bálambhaṭṭa understood it in precisely the same sense as that here assigned to it. The judgment goes on to support the restrictive interpretation of "strídhana" by the analogy of the Bengal law, and it is said "The separate property of ladies of rank in this country very often devolves on their successors by inheritance............ All such would be strídhana." But if the text of the Mitákshará is to be deserted it is of importance to observe that "stridhan which has once devolved . . . . . . ceases to be ranked as such" (Macnaghten, Hindú Law, I. 38), so that the supposed application of the term "inheritance" fails. In the recent case of Bhugwandeen Doobey *vs.* Myna Baee (Calcutta Weekly Reporter IX., Pr. Ca. 23) the Privy Council have laid down that neither moveable nor immoveable property inherited by a widow from her husband is "strídhana." All that it was necessary to decide for the purposes of the case was that neither class of property was alienable by the widow. Their Lordships appear to have considered that they could not hold this without saying that such property was not "strídhana :" and taking "strídhana" in the limited sense of the Bengal school this would be so, but not, it is submitted, if the word be taken in the wider sense which Vijñánes'vara contends for. In the same judgment it is said that the mention of the husband as an heir (failing descendants) in para. 25 of Chapter II., Section XI., of the Mitákshará is an argument to show that by "property acquired by inheritance," in para. 2 no more can have been meant than property so acquired during the husband's life. But to this there are two objections—first, that Vijñánes'vara expressly argues against any narrowing of the etymological sense of strídhana; and secondly, that, in treating of the whole subject of the inheritance to a woman's property, it was necessary to include those cases which would, from their nature, prevent the existence of one or more particular species of the genus "strídhana." No one would contend from the mention of the parents as a man's heirs (Chapter III., Section I., para. 2, Section III.) that the rules of inheritance to a male's property apply only to property acquired during the parents' lives. But what it appears ought to be conclusive

of the question to one who bears the whole of the Mitákshára on Inheritance in recollection is this, that in Chapter II., Section I., Vijñánes'vara arrives by a long and elaborate argument at the conclusion (para. 39) that "a wedded wife being chaste takes the whole estate of a man who being separated from his co-heirs and not subsequently reunited with them, dies leaving no male issue," and that after thus vesting her with the *whole estate* he provides no rule whatever for its further devolution, unless it be identified with her strídhana, as subsequently defined by him. It is not to be supposed that he would leave this important matter unprovided for: it is almost inconceivable that he should not have seen that Section XI., paras. 1—4, must, following Section I., lead to the idea that property inherited from a husband was meant to be included in strídhana," or that, if this really was not his meaning, he should not have guarded his readers against an error into which they must necessarily fall. So also as to property inherited by a daughter, no rule except as to strídhana, is provided.

It is satisfactory, considering the hold that the doctrine which we are considering has obtained on the Courts, that the practical results of these different views of the comprehension of the term strídhana differ much less than the theories from which they spring. A widow, according to the Mitákshará, "takes the whole estate" of a separated coparcener; but having taken it she may still be under restrictions as to its employment, just as a male proprietor is in the case of ancestral property in which others are interested. The Mayúkha, quoting Nárada (Chapter IV., Section X., para. 9), says that even over what was expressly bestowed upon her by her husband the widow's power is restricted in the case of immoveable property. "She may consume (such a gift) as she pleases after his death, or give it away, excepting immoveable property." The same restriction applies *à fortiori* to land inherited from her husband without any express gift; but this restriction is not inconsistent with the Hindú lawyers' notions of proprietorship. "Neither father nor grandfather (is master) of the whole immoveable estate" (Mitákshará, Chapter I., Sec. I., 21, 23). He is "subject to the control of his sons and the rest in regard to the moveable estate" (*Ibid.*, para. 27). Women, though to be honoured (Colebrooke's Digest, Bk. IV. T. 43), are in no case to be independent (*Ibid.* T. 67). A husband can in emergencies make use of their "strídhana" (V. Mayúkha,

Chapt. IV., Section I., para. 10; Mitákshará, Chapt. II., Section XI., para. 31); and Vijñánes'vará (Mitákshará, Chapt. II., Section I., para. 25), while insisting on women's capacity to inherit, admits with Nárada that they have "no right to independence," no right, that is, to dispose at pleasure of property though their own, and therefore included in "strídhana" by the Mitákshará, except that over which unlimited power is conferred by express texts, exceptions to the general rule. These texts do not confer any such power over property inherited from the husband, and on this principle the decision of the Privy Council is to be supported, as unquestionably sound, though the property to which it related was really strídhana.

As to what follows on the widow's death her inheritance implies that she had no son; and if she have a daughter, that daughter succeeds equally whether the property be regarded as "strídhana" or not. If she have no daughter, the peculiar doctrine of the Mitákshará as to the devolution of the estate (see Digest, page 212), which prevents, in all ordinary cases, its alienation from the husband's family, appears to be a complementary or compensatory one as compared with that of the Mayúkha, and thus to confirm the view here taken of Vijñánes'vara's theory of the strídhana. The daughter's daughter may inherit, but, on the other hand, the husband and his family are made heirs of property which according to the Mayúkha &c. would be taken by the family of the deceased wife or widow.

On the Judgment of the Madras High Court in the Appeal Case Sengamalatthamal vs. *Valaguda Mudali, No.* 505 *of* 1866, *Madras High Court Reports III.*, 312.

1. The points involved in this judgment which have a special interest for the lawyer in Western India are—

(*a*) The fact that the Madras High Court discredits the opinion of the author of the Mitákshará, that property inherited by a woman is strídhana, or at all events descends to her daughters and other heirs, as other particular kinds of strídhana are generally held to do.

(*b*) The fact that the Madras High Court holds that, Vijñánes'vara's opinion having no weight, property inherited by a woman from her own family must be inherited by her blood-relations.

2. As regards the first point, the Court asserts—

(*a*) That Vijñánes'vara's opinion stands opposed to that of all the other Hindu lawyers;

(*b*) That he has given a too extensive and improper interpretation to the word ádi, 'and other,' which occurs in Yájñavalkya's text; and

(*c*) That either his opinion must be rejected, or that we must understand that though Vijñánes'vara calls all separate acquisitions of a woman strídhana, he nevertheless does not mean to say that all kinds of strídhana descend in the same manner.

3. As regards the suggestion that Vijñánes'vara should have intended the rules given, Mit., Chapter II., Section XI., paras. 9 *sqq.*, to apply to some kinds only of that property classed by him as strídhana, its inadmissibility becomes clear, it is submitted, if the beginning of para. 8 is kept in mind. Vijñánes'vara says, para. 8: "A woman's property has been *thus described*. The author next propounds the distribution *of it*" [or more literally "*of that*"]. It evidently goes against all rules of interpretation to suppose that the word '*that*' or '*it*' refers to a part only of the subject previously defined.

4. As regards the charge brought against Vijñánes'vara, that he interpreted improperly and too widely Yájñavalkya's expres-

sion ádi, 'and other,' by substituting "and (*any*) other (*separate acquisition*)" for "and other acquisitions of the same kind," it would, on further consideration, seem just as little tenable as the alternative interpretation of Vijñánes'vara's words rejected above. Yájñavalkya's term ádi, 'and other,' would, according to the common use of the Hindu scientific writings (*i.e.*, Sútras, Smṛitis, and other Institutes) admit, if taken by itself and irrespectively of other passages, of several interpretations.

It might mean—

(*a*) and other (*property of the same kind*),

(*b*) and other (*kinds of property mentioned previously in this work or by other lawyers*),

(*c*) and other (*kinds of property commonly known to be strídhana*),

(*d*) and (*any*) other (*separate acquisition*).

The authors of the Institutes of Hindu Law (Shástras) aim chiefly *at brevity*, because their compositions were intended to be learnt by heart, and they very frequently sacrifice clearness to brevity. For they considered clearness of less value, because their works were only composed in order to be taught in the Brahminical schools or cháraṇas, and were copiously explained by the masters, who had received the meaning of the manuals, either immediately or mediately, from the authors themselves. In order to attain this much-desired brevity, they particularly gave to small words like *ádi*, 'and other,' *iti*, 'thus,' *cha*, 'and,' a *pregnant* meaning. It requires a close and attentive study of each Shástra in order to be able to decide whether the Hindu commentators are right or wrong in their explanation of such words, and in the consideration of such questions it should always be borne in mind that a good many interpretations found in our written commentaries were taught by the old authors and their successors in the schools.

These remarks will show on how dangerous a ground those tread who, without very strong reasons, forsake the manner of interpretation adopted by Híndú commentators, especially in the case of men who enjoy so general a reputation for learning in the Shástras as Vijñánes'vara has done for the last four hundred years.

Fortunately, however, we are not dependent on this general train of reasoning for the vindication of Vijñánes'vara's explanation of the words 'and other.' Vijñánes'vara could only explain '*ádi*,' as he does, by 'and (*any*) other' (*separate acquisition*);

(*a*) Because Yájñavalkya had declared (Mit., Chapter I., Section III., para. 8 *sqq.*) that daughters inherit the strídhana of their mothers.

(*b*) Because Yájñavalkya had declared (Mit., Chapter II., Section I.) that widows inherit the estate of a separated husband who dies without heirs in the male line, and Vijñánes'vara had shown that such an estate becomes the *property* of such widows (see particularly *ibidem*, para. 39).

(*c*) Because Yájñavalkya had declared (Mit., Chapter II., Section II., paras. 1—4) that a daughter inherits the estate of her father on failure of a widow.

(*d*) Because Yájñavalkya had declared (Mit., Chapter II., Section III.) that a mother inherits the estate of a separated predeceased son, on failure of wives, daughters, and daughters' sons.

(*e*) Because Yájñavalkya had declared (Mit., Chapter II., Section V.) that a paternal grandmother and other female relations likewise are capable of inheriting the estate of a predeceased grandson &c. As all these passages precede the definition of the term strídhana, it is clear that the term ádi, 'and other,' used in the latter, must have reference to them, and that it must be intended to include all the property inherited by a woman under the above passages.

If Vijñánes'vara includes in the meaning of ádi also other separate acquisitions by seizure, finding, &c., that seems to have been done on account of the diversity of the opinions of the older Smṛitis on the subject of strídhana. For it is the principle of Hindu lawyers, in case the Smṛitis vary in the enumeration of particular objects to be classed under one head, to admit all the objects enumerated by all the Smṛitis, in order to maintain their ekavákyatá, or 'general harmony.'

Vijñánes'vara's reasoning seems to have been this: "Inherited property must be included by the word 'ádi,' and as regards other kinds of gains the Smṛitis give so many different statements, that it is as well to include 'any kind of separate acquisition,' and to apply the general rule. If the literal sense be admissible, a technical acceptation (of a word) is improper." (Mit., Chapter II., Section XI., para. 3.)

In this definition of the word strídhana Vijñánes'vara does *not* stand alone. It is upheld by his commentators, Vis'ves'vara and Lakshmídeví Bálambhaṭṭa, and amongst lawyers of authority in Bombay, by Nílakaṇṭha (Mayúkha) and Mitramis'ra (Víramitro-

daya). All of them declare that any separate acquisition of a woman is strídhana, *i.e.*, property primarily intended as a provision for herself, and for her daughters, which can only be used by her husband under certain peculiar circumstances, which cannot be taken from her at a division of the family estate, and over which she has a right of disposal under certain restrictions.

5. But as regards the descent of such property, that question is not decided uniformly, even by the lawyers of Western India. Here Vijñánes'vara, and his commentators, stand alone, in allowing the whole of it to descend in one manner, while even the Víramitrodaya deviates slightly from them in his rules regarding the inheritance to a woman leaving issue, and entirely in regard to remoter heirs.

This is also the point of doctrine which seems to have been particularly objectionable to the Madras High Court, but especially the circumstance that, according to Vijñánes'vara, property inherited by a widow from her predeceased husband descends to *her* heirs, and not to *his*.

In order, however, to estimate Vijñánes'vara's position correctly, it must be understood that the other schools of law do not oppose him in a close phalanx. There is nearly as much difference between the doctrines of the Bengálís and those of the Southerners, between those of the Bengálís and Southerners and those of the Benares school, as between all of them and Vijñánes'vara. The question as to the descent of strídhana is, as Kamaḷákara says, one for which the lawyers have a "general scrimmage," and there are hardly, even in any one school, two authorities who fully agree with each other. The reason for such diversity of opinions lies partly in this, that the old legislators held very conflicting opinions regarding strídhana and its descent, and partly therein that the modern authors, who consider it their duty to reconcile with each other all the opinions of the ancient Smṛitis, twist and turn them in various ways, each according to his individual inclination—a proceeding which is much facilitated by the brief and enigmatic language of the ancients. An example will make this clearer. The Bengál, Madras, and Benares schools state unanimously that the estate of a married female must be divided into (1) Yautuka, * (2) Ayautuka (regarding the definition of which terms they differ), and that each of these two divisions

* Regarding the meaning of this term see above, Viramitrodaya on Strídhana, Sect. II., paras. 7 and 8.

descends in a peculiar manner, but the order of heirs varies in each school. The Mayúkha, on the other hand, makes three divisions—(1) Yautuka, (2) Ayautuka páribhâshika, and (3) Apáribhâshika (property obtained by inheritance, labour, &c.), and assigns each kind to a particular line of heirs. Vijñánes′vara and his adherents, finally, make no such distinctions, but teach that all strídhana descends in the same manner. How does this difference arise? Simply thus, that Vijñánes′vara makes Gautama and Yájñavalkya, who acknowledge no distinction in the descent of strídhana, his chief authorities, and interprets the apparently conflicting passages of other Smṛitis through them, whilst the Bengal, Madras, and Benares lawyers place other texts, especially Manu IX., 192—194, 198, at the head, and interpret Yájñavalkya and Gautama through them. Finally, Nílakaṇṭha obtains his three classes of strídhana by first following Manu's texts, and then amending them by a novel explanation of Yájñavalkya II. 118.

It would therefore not seem advisable to upset Vijñánes′vara's doctrine on account of the numerical strength of his opponents, since they do not agree with each other, and their opinions are not founded on a better system of interpretation of the old authorities than that employed by him.

It would seem more suitable to seek the test for Vijñánes′vara's doctrines in the answers to the following two questions:—

1. Does Vijñánes′vara's doctrine regarding strídhana and its descent contain a self-consistent system?

2. Does this system agree with the fundamental principles of the Hindu Law?

Both questions can be answered in the affirmative.

(*a*) As regards Vijñánes′vara's system, a wife, according to his opinion, is '*born again*' in the family of her husband, and becomes a sapiṇḍa-relation of all her husband's blood-relations. On account of the formation of these new ties, her connexion with her blood-relations, though not severed, is considerably weakened, so much at least that her new relations form a barrier between her and her blood-relations. This appears particularly in the duties of the connexions by marriage, to maintain and protect her, and to provide for her obsequies and S′ráddhas. Further, all separate acquisitions of a married woman form a hoard, which in the first instance is intended to provide for herself, for her daughters and their offspring.

Vijñánes′vara's rules regarding the descent of strídhana are sim-

ply and rigorously deduced from these two premises. The woman's strídhana goes first to her daughters and their offspring, a preference being always given to the unprovided over the provided for, next to her husband, then to his sapiṇḍas, and finally back to her sapiṇḍas. The latter rule is not given explicitly by Vijñánes'vara, but there appears to be no doubt that it was his doctrine.

It would hardly be possible to find a simpler or more consistent solution for so intricate a problem than that given by Vijñánes'vara.

(*b*) As regards the second question, there is only one maxim of the Hindu law with which Vijñânes'vara's doctrine might *seem* to come into collision. It might be asserted, and it has been asserted, that under Vijñánes'vara's rules family property inherited by a married woman from males would be allowed to go out of the family to be diverted from its proper destination. No doubt if this objection were well founded it would have some weight against Vijñánes'vara's doctrines, since the preservation of the family property is of paramount importance for the Hindu lawyer.

But, taking even the most unfavourable case, that of a widow who inherits the estate of her predeceased husband, a simple comparison of the two lines of heirs will show that the succession of the widows will, except in one case, not divert the estate from the family.

It will descend—

(*a*) *As a male's property.*	(*b*) *As strídhana.*
1. To daughter.	1. To daughter.
2.	2. To daughter's daughter.
3. To daughter's son.	3. To daughter's son.
4. To mother, father, brothers, brother's son, grandmother, and other sapiṇḍas.	4. To the husband's sapiṇḍas, *i. e.*, to the same persons as under *a* 4, according to the degree of their nearness.

The only case in which strídhana inherited from a husband would leave the family is that in which daughters' daughters would take it in preference to a father or brother. But it ought to be remembered that the line of heirs to a male allows the same to be done in the cases of daughters and daughters' sons. It would therefore be hardly advisable to press this point.

6. Finally, even though it should be held that the Madras High Court has justly overthrown Vijñánes'vara's opinion, its decision should not, it is submitted, affect the law of this presidency, as it stands in contradiction also to the Mayúkha, and it would be necessary to follow the latter in preference to the Bengal law.

INDEX.

BOMBAY : PRINTED AT THE EDUCATION SOCIETY'S PRESS, BYCULLA.